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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 521

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

EDITH ANDREWS LOGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1930
CERTIORARI GRANTED DECEMBER 1, 1930

(35443)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 521

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

EDITH ANDREWS LOGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 5508

EDITH ANDREWS LOGAN, 814 STAMBAUGH BLDG., YOUNGSTOWN, O.

v.

COMMISSIONER OF INTERNAL REVENUE

For taxpayer: Millard Fillmore Tompkins, Esq., 30 Broad St., New York; Walter M. Anderson, Esq., John W. Ford, Esq. For commissioner: J. D. Foley, Esq., L. C. Mitchell, Esq. Mr. Smith, member.

Docket entries

1925

July 13—Petition received and filed.
July 16—Copy of petition served on solicitor.
July 16—Notification of receipt mailed taxpayer.
Aug. 4—Answer filed by solicitor.
Aug. 11—Copy of answer served on taxpayer. Assigned to 12/9/25.
Dec. 8—Stipulation for transfer to reserve calendar filed.
Dec. 11—Order placing on reserve calendar B, signed and filed. Both sides notified.

2]1926

Sept. 7—Hearing set for 10/26/26.
Sept. 7—Hearing had before Messrs. Sternhagen and Love, on taxpayer's motion that it remain on res. cal: together with No. 5916, 5917, and 5918 pending decision of Docket 4447 and 5461. Motion granted.
Sept. 9—Ordered that proceedings remain on res. cal. together with #5916-17-18 for hearing pending the Decision of Docket 4447 & 5461, signed and filed. Both sides notified.
Sept. 25—Notice that hearing 10/26/26 be disregarded.

1927

Mar. 22—Hearing set 5/16/27.
May 3—Motion for a continuance to Sept. 12, 1927, filed by taxpayer.
May 5—Granted to Oct. 12, 1927. Both sides notified.
Sept. 22—Ordered—Hearing date changed to Nov. 8, 1927, on merits. Signed & filed. Both sides notified.
Nov. 7—Motion to continue to 1/10/28 or thereafter, filed by taxpayer.
Nov. 7—Granted to Jan. 17, 1928. Both sides notified.

1928

Jan. 17—Hearing had before Mr. Smith on merits. 60 days allowed to file briefs. Agreed statement of facts filed.
Jan. 21—Transcript of hearing 1/17/28 filed.
Mar. 9—Agreed statement of facts, proposed findings and brief filed by taxpayer.

Mar. 14—Brief filed by G. C.
June 15—Order of redetermination entered.
June 14—Findings of fact and opinion rendered. Mr. Smith. Judgment will be entered for the commissioner.
Dec. 12—Supersedeas bond for $44,097 approved and ordered filed.
Dec. 13—Notice of appearance of Chas. D. Hamel and E. H. McDermott filed.
Dec. 13—Stipulation of venue filed. 2nd Circuit.
Dec. 13—Petition for review by U. S. Circuit Ct. of Appeals (2nd) with assignments of error filed by taxpayer.
Dec. 13—Proof of service filed.

1929

Feb. 1—Motion to enlarge time to 4/1/29 to prepare evidence, etc., filed by taxpayer.
Feb. 5—Order enlarging time to April 1, 1929, for preparation of evidence and transmission and delivery of papers—entered.
Mar. 19—Motion to enlarge time to 6/1/29 for preparation of evidence and transmission of record filed by G. C.
Mar. 20—Order enlarging time to June 1, 1929, for preparation of evidence and delivery of record papers—entered.
May 29—Motion to enlarge time to July 1, 1929, for preparation of evidence and delivery of record filed by G. C.
June 1—Order enlarging time to July 1, 1929, for preparation of evidence and transmission and delivery of record papers entered.
4 June 21—Motion for extension to Aug. 1, 1929, to file statement of evidence and transmit record filed by taxpayer.
June 24—Order enlarging time to Aug. 1, 1929, for preparation of evidence and transmission and delivery of record papers *sur* petition entered.
Aug. 1—Motion for enlargement of time to 8/31/29 to prepare evidence and deliver record filed by taxpayer.
Aug. 1—Order enlarging time to Aug. 31, 1929, for preparation of evidence and delivery of record entered.
Aug. 27—Transcript of hearing Aug. 16, 1929, filed.
Aug. 29—Motion for extension to Sept. 15, 1929, to file statement of evidence and transmit record filed by taxpayer.
Aug. 30—Order enlarging time to 9/16/29 for preparation of evidence and delivery of record—papers—entered.
Sept. 14—Motion for extension to Oct. 15, 1929, to file statement of evidence and transmit record filed by taxpayer.
Sept. 16—Order enlarging time to Oct. 15, 1929, for preparation of evidence and transmission and delivery of record entered.
Sept. 27—Agreed praecipe filed.
Sept. 27—Agreed statement of evidence lodged.
Sept. 30—Agreed statement of evidence approved and ordered filed.

5 Now, October 3, 1929, the foregoing docket entries certifies from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[SEAL.]

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed July 13, 1925

Docket No. 5508. [Title omitted.]

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his letter (IT:PA:1-60D VMW-104) dated June 20, 1925, and as the basis of her appeal sets forth the following:

(1) The taxpayer is a resident citizen of the United States, whose address is 814 Stambaugh Building, Youngstown, Ohio.

(2) The deficiency letter, copy of which is attached, was mailed to the taxpayer on June 20, 1925.

6 (3) The tax in controversy is income tax for the years 1915 to 1920, inclusive, and is more than $10,000.00 to wit, $22,048.63.

(4) The determination of the tax shown in the deficiency letter is based upon the following errors. The Commissioner of Internal Revenue has erred:

(1) In adding to the net income reported in the returns filed by the taxpayer for the years 1917 to 1920, inclusive, under the general and erroneous description "ore payments received from the Youngstown Sheet & Tube Company less returns of capital thereon," the following sums, to wit:

1917	$6,677.55
1918	7,588.52
1919	19,307.46
1920	11,685.44

and adding to net income reported in the returns filed by the taxpayer for the years 1917 to 1920, inclusive, any sums whatever in respect of the transactions so described.

(2) In treating as taxable income for the years 1917 to 1920, inclusive, any portion of the sums received by the taxpayer during those years as part of the sale price of shares of stock in the Andrews
7 and Hitchcock Iron Company which were sold during the year 1916, the sums received during the respective years being the following:

1917	$9,900.00
1918	11,250.00
1919	28,785.60
1920	17,421.79

The facts upon which the taxpayer relies as the basis of her appeal are as follows:

(1) Prior to March 1, 1913, and continuously to March 11, 1916, the taxpayer owned 250 shares of the capital stock of the Andrews and Hitchcock Iron Company the value of which at March 1, 1913, exceeded the cost of the shares to the taxpayer.

(2) At March 11, 1916, the outstanding stock of the Andrews and Hitchcock Iron Company consisted of 4,000 shares.

(3) On March 11, 1916, the stockholders of the Andrews and Hitchcock Iron Company sold to the Youngstown Sheet & Tube Company for $2,200,000.00 in cash and a sum to be thereafter paid equal to 60% per ton of iron ore to the delivery of which from the Mahoning Ore & Steel Company, the Youngstown Sheet & Tube Company should thereafter be entitled as an incident of the ownership by the Andrews and Hitchcock Iron Company of one-
8 twelfth of the capital stock of the Mahoning Ore & Steel Company; the payments to be made annually on the basis of the ore to the delivery of which the Youngstown Sheet & Tube Company should become entitled during each year.

(4) Prior to March 1, 1913, and continuously to March 11, 1916, Louisa Andrews, mother of the taxpayer, owned 1,100 shares of the capital stock of the Andrews and Hitchcock Iron Company which shares were sold in 1916 as above set forth and by a bequest in the will of said Louisa Andrews, the taxpayer received a one-half interest in the estate and became entitled to receive 550/4000ths of the unpaid purchase price at the date of her mother's decease which occurred March 22, 1917.

(5) During the years 1917 to 1920, inclusive, the taxpayer received as part of the sale price, the following sums, to wit:

1917	$9,900.00
1918	11,250.00
1919	28,785.60
1920	17,421.79

(6) The aggregate sum of the amounts received by the taxpayer prior to December 31, 1920, as part payment of sale price of the 250 shares owned prior to March 11, 1916, including her share of
9 the consideration of $2,200,000.00 in cash paid in 1916, was less than the value at March 1, 1913, of said 250 shares.

(7) The aggregate sum of the amounts received by the taxpayer prior to December 31, 1920, in respect of the unpaid sale price at the date of her mother's decease was less than the value fixed upon her interest for the purpose of the Federal estate tax.

(8) The taxpayer keeps no books and the returns of the taxpayer for the years 1916 to 1920, inclusive, were made upon the basis of cash receipts and disbursements.

The taxpayer in support of her appeal relies upon the following propositions of law:

(1) That in the case of a taxpayer who keeps no books, the taxable income must be determined upon the basis of cash receipts and disbursements.

(2) That in the case of sale of property acquired before March 1, 1913, such as shares of stock, the aggregate amount of the income taxable at any time or times can in no event be greater than the excess of the consideration received over the fair value of the property at March 1, 1913.

(3) That in the case of property acquired under a will, taxable income can, in no event, exceed the value of the property at the date of the death of the testator.

10 (4) That in the case of the sale of property for a consideration which is indeterminate (prior to the date of the last payment to be made) no taxable income arises until the aggregate consideration received exceeds the amount which is to be returned to the taxpayer free of tax and that after this amount has been returned all subsequent receipts are taxable income.

(5) That in the case of the conversion of property received from a decedent estate the amount to be received in respect of which is indeterminate (prior to the date of the last sum to be received in respect thereof) no taxable income arises until the aggregate sum received exceeds the value of the property at the date of the death of the decedent.

Wherefore the taxpayer respectfully prays that this board may hear and determine its appeal.

WALTER M. ANDERSON,
Counsel for the Taxpayer, Greenwich, Conn.

Verification

STATE OF CONNECTICUT,
County of Fairfield, ss:

GREENWICH, *July 7, 1925.*

Walter M. Anderson, being duly sworn, deposes and says that he is the duly constituted attorney of the taxpayer in whose behalf the foregoing petition is submitted; that the taxpayer is
11 absent from this country; that he has read the same petition and is familiar with the statements contained therein and that the facts therein stated are true to the best of his knowledge, information and belief.

WALTER M. ANDERSON.

Sworn to and subscribed before me, this 7th day of July, 1925.
[SEAL.] (S.) PERCY D. ADAMS,
Notary Public.

(Copy)

TREASURY DEPARTMENT,
Washington, June 20, 1925.

IT:PA:1-60D.
VMW-104.

MRS. EDITH ANDREWS LOGAN,
814 Stambaugh Building, Youngstown, Ohio.

MADAM: The determination of your income tax liability for the taxable years 1915 to 1920, inclusive, as set forth in office letter dated August 8, 1923, has been changed to disclose a deficiency in tax amounting to $22,048.63 for the years 1918, 1919, and 1920, and overassessments amounting to $1,951.48 for the years 1915, 1916, and 1917. The adjustments made are explained in the attached statement.

12 In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:1-60D:VMW-104. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By J. G. BRIGHT,
Deputy Commissioner.

Enclosures:
Statements.
Agreement—Form A.

13 Statement

IT:PA:1.
VMW-104-60D.

In re: Mrs. Edith Andrews Logan, 814 Stambaugh Building, Youngstown, Ohio.

	Deficiency in tax	Overassessment
1915 (claim filed)		$18.60
1916 "		1,441.15
1917 "		491.73
1918 (waiver filed)	$994.05	
1919 "	14,277.92	
1920	6,776.66	
Totals	22,048.63	1,951.48

Your income tax liability has been adjusted in accordance with the recommendation of the former Committee on Appeals and Review as follows:

1915

Net income reported by revenue agent		$35,738.79
No adjustments.		
Personal exemption	$3,000.00	
Cash dividends	44,567.50	
		47,567.50
Surtax on net income		157.39
14 Original tax assessment:		
March, 1916—Folio 26, Line 15	105.06	
Additional tax assessment:		
March, 1920, page 9, line 0	74.93	
		179.99
Overassessment		22.60
To be abated—Form 47 filed April 30, 1920	18.60	
Not allowable—no claim for return filed	4.00	
		22.60

1916

Net income reported in original return		$19,151.16
Deduct:		
Overstatement of dividends received from Carbon Limestone Co	$2,500.00	
Add:		
Erroneous deduction of expenses	$490.00	
Understatement of interest received	50.00	
	540.00	
		1,960.00
Adjusted total net income		$17,191.16
15 Cash dividends	27,320.25	
Personal exemption	3,000.00	
		30,320.25
Tax assessment March, 1920, page 9, line 1	1,441.15	
Total tax due	None.	
Overassessment	1,441.15	

From a reconsideration and audit of the information and data on file, it is disclosed that no profit was realized in 1916 from the sale of the Andrews and Hitchcock Iron Company stock to the Youngstown Sheet and Tube Company, and, accordingly, the profit as computed by the revenue agent who verified your return has been excluded therefrom. A portion of the receipts from the ore shipments in subsequent years, however, is taxable, the basis of which is set forth in the statement showing the tax adjustment for your 1917, and subsequent years, returns. The adjustments indicated above are taken from the report submitted by the revenue agent and the resulting adjustments operate to further reduce your net income below the statutory exemption.

1917

		1916 rates	1917 rates
	Net income reported in original return	$6,854.88	$8,106.18
	Dividends reallocated	3,709.88	3,709.88
	Balance at 1916 rates	3,145.00	
16	Add:		
	Profit on sale of real estate		4,695.00
	Ore payments of $9,900.00 received, less return of capital of $3,222.45		6,677.55
	Total		23,188.61
	Deduct:		
	Balance of contributions not claimed		1,424.46
	Adjusted total net income at 1917 rates		21,764.15
	Cash dividends	$18,195.65	
	Personal exemption	1,000.00	
			19,195.65
	Subject to 2% normal tax		2,568.50
	Additional exemption		2,000.00
	Subject to 2% normal tax		568.50
	2% normal tax	51.37	
	2% " "	11.37	
	Surtax, 1917 rates, on $21,764.15	641.13	
	Surtax, 1916 rates, on $3,145.00	31.45	
	Total tax liability	735.32	
	Original assessment, April, 1918 $37.12		
	Additional assessment, May, 1918 5.15		
17	Additional assessment, March, 1920, page 9, line 2 1,184.78		
			1,227.05
	Overassessment		491.73

You are advised that your taxable income from ore payments has been determined in accordance with the recommendation of the Committee on Appeals and Review. The following depletion schedule has been computed in accordance therewith:

Depletion schedule

Year	Receipts from ore	Tons paid for	Sustained	Depletion allowed	Claimed by omission
1917	$9,900.00	16,500	$3,222.45	$3,222.45	$9,900.00
1918	11,250.00	18,750	3,661.48	3,661.48	11,250.00
1919	28,785.60	47,976	9,478.14	9,478.14	28,785.60
1920	17,421.79	29,036	5,736.35	5,736.35	17,421.79

From the data on file in this office it is disclosed that the cash dividends of $3,057.00, received from the Youngstown Sheet and Tube Company, and $634.88 from the First National Bank of Youngstown, Ohio, were paid from earnings accumulated in 1917, and therefore are taxable in that year's rates.

The pension received of $300.00 has not been included in the taxable income for this year or later years, inasmuch as pensions paid by the United States Government to widows of soldiers, as such, are not taxable income. A profit of $4,695.00 was derived from
18 the sale of 19.43 acres of "Oriole Farm" for $33,800.00, the March 1, 1913, fair market value being determined to be $1,500,000 an acre from the evidence and information set forth in the report of the revenue agent, which profit was not returned by you.

As a result of the increase in the amount of your total net income, the full amount of the contributions of $4,064.65 made by you during 1917, has been allowed instead of $3,389.44, the previous deduction, which was limited to 15% of your total net income.

1918

Net income reported on original return		$26,692.56
Deduct:		
Pension received		300.00
		26,392.56
Add:		
Ore payments received from Youngstown Sheet and Tube Company, $11,250.00, less return of capital thereon of $3,661.48		7,588.52
Adjusted total net income		33,981.08
Less:		
Personal exemption	$1,000.00	
Cash dividends	55,966.50	
		56,966.50
Income subject to normal tax		None.
Surtax on net income		2,387.16
Assessed on original return, May, 1919		1,393.11
Deficiency in tax		994.05

19 The ore receipts from the Youngstown Sheet and Tube Company less the return of capital thereon have been included as income as shown herein under the statement showing the income and tax adjustment for 1917.

1919

Net income reported on original return		$7,146.30
Add:		
Loss reported on sale of Wick Ave. property	$50,025.00	
Loss corrected to	3,125.00	
		46,900.00
Corrected profit disclosed on sale of East Federal Street property	7,727.28	
Profit reported thereon originally	7,767.79	
Decrease		40.51
Corrected profit disclosed on sale of West Federal Street property	6,149.32	
Profit reported thereon originally	5,499.32	
		650.00
Additional interest received		217.50
Cash dividends omitted		7,528.91
Ore receipts of $28,785.60 received from Youngstown Sheet and Tube Company less return of capital thereon of $9,478.14		19,307.46
Total		81,709.66
20 Less: Additional contributions allowed		3,500.03
Adjusted total net income		78,209.63
Less:		
Personal exemption	$1,000.00	
Cash dividends	72,044.80	
		73,944.80
Balance		4,264.83
Subject to 4% normal tax		4,000.00
Subject to 8% normal tax		264.83
4% normal tax		160.00
8% normal tax		21.19
Surtax on net income		14,129.66
Total tax liability		14,310.85
Tax assessed on original return, March, 1920		32.93
Deficiency in tax		14,277.92

The inclusion of the receipts of $28,785.60 in gross income representing your share of the ore payments by the Youngstown Sheet and Tube Company with a deduction therefrom of $9,478.14, representing a return of capital is based on the schedule in the statement following your tax adjustment for 1917.

The addition of $217.50 to gross income representing additional interest received on mortgages; additional cash dividends of
21 $7,528.91 and additional contributions of $3,500.03 are fully explained in the report of the revenue agent. These items were included in the amended return and brief filed by you under date of March 30, 1922.

Careful consideration has been given to the statements and information contained in the brief and the computation of the loss of $3,125.00 from the sale of the residence on Wick Avenue and the profit of $6,149.32 from the sale of the business property on West Federal Street, have been found to be correct. With respect to the

profit derived from the sale of property on East Federal Street, the computation thereon as set forth in your brief has been reviewed carefully and as a result thereof, the cost of $216,000.00 as determined for the purpose of the Federal estate tax has been used instead of $163,090.00, previously indicated in the revenue agent's report. In accordance with the recommendation of the Committee on Appeals and Review, the profit from the sale of the East Federal Street property has been computed on the installment basis, as shown in your brief.

1920

Net income reported on original return		$99,194.82
Add:		
Ore receipts from the Youngstown Sheet and Tube Company of $17,421.79 less return of capital thereon of $5,736.35		11,685.44
		110,880.26
22 Deduct:		
Tax paid at source on tax-free covenant bonds previously included as income	$36.00	
Pension received	300.00	
		336.00
Adjusted total net income		110,544.26
Less:		
Personal exemption	1,000.00	
Cash dividends	85,825.86	
		86,825.86
Balance		23,718.40
Subject to 4% normal tax		4,000.00
Subject to 8% normal tax		19,718.40
4% normal tax		160.00
8% " "		1,576.67
Surtax on net income		28,993.02
Total		30,729.69
Less: 2% normal tax paid at source		36.00
Total tax liability		30,693.69
Tax assessed on original return, April, 1921		23,917.03
Deficiency in tax		6,776.66

23 The inclusion in gross income of the receipts from the Youngstown Sheet and Tube Company representing your share of the ore shipments with a deduction of $5,736.35, representing a return of capital, is based on the explanation of this transaction in the statement following the adjustment of your net income and tax liability for 1917.

In accordance with the provisions of a recent court decision, the amount of $36.00, representing tax paid for you at the source on tax-free convenant bonds, has been eliminated from the taxable net income.

Payment of the deficiency in tax should not be made until a bill is received from the collector of internal revenue for your district and remittance should then be made to him.

The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the collector of internal revenue for your district. If the tax in question has not been paid the amount will be abated by the collector. If the tax has been paid, the amount of the overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessments do not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.

The appeal referred to on page 1 refers only to the deficiencies in tax as the revenue act of 1924 does not provide for appeals on overassessments.

24 Now, October 3, 1929, the foregoing petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Answer

Filed Aug. 4, 1925.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraphs 1, 2, and 3 of taxpayer's petition.

2. Avers that the commissioner has not since June 2, 1924 proposed to assess any deficiency for the year 1917.

25 3. Avers that the commissioner has determined that an overassessment was made for the year 1917 as shown by the deficiency letter attached to the petition. For these reasons the commissioner asks that the portion of the petition relating to the year 1917 be stricken therefrom.

4. Admits that the commissioner has included as part of the taxpayer's income the amounts set out in subdivision 1 of paragraph 4 of the petition representing ore payments received from the Youngstown Sheet & Tube Co., less returns of capital thereon. Denies that any error was committed thereby.

5. Admits that the taxpayer received the sums set out in subdivision 2, paragraph 4, of the petition, in connecting with the sale of stock in the Andrews & Hitchcock Iron Company.

6. Admits paragraphs numbered 1, 2, 3, 4, and 5 on page 2, of the petition and paragraph numbered 8 on page 3 of the petition.

7. Avers that the allegations in paragraphs numbered 6 and 7 on page 3 of the petition are incompetent, irrelevant, and immaterial as part of the petition and asks that the said allegations be stricken therefrom.

9. Denies generally and specifically each and every allegation contained in the taxpayer's petition, not hereinbefore admitted, qualified, or denied.

26 Proposition of law

The amounts set out in the petition were properly included as income under the provisions of section 2(a), title 1, of the revenue act of 1917 and section 213(a) of the revenue act of 1918.

Wherefore it is prayed that taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:
L. C. MITCHELL,
Special Attorney, Bureau of Internal Revenue.

Now, October 3, 1929. the foregoing answer certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

A true copy.
Teste:

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Docket Nos. 5508, 5916, 5917, 5918, 6014, 6436, 6437, 6438, 18202

EDITH ANDREWS LOGAN, ET AL.,[1] PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Promulgated June 14, 1928

Findings of fact and opinion

1. Petitioners sold stock on March 11, 1916, for more than cost and for more than the March 1, 1913, value. A part of the consideration received was a contract providing for future payments as ore was mined. The contents and life of the mine and the annual production were capable of determination. Held, that the contract received had a determinable fair market value at the date of receipt.

[1] The following proceedings were heard with the above and are decided herewith: Henry W. Heedy, Docket No. 5916; William J. Hitchcock, Docket No. 5917; Frank Hitchcock, Docket No. 5918; William M. Andrews, Docket No. 6014; Carrie L. Shaw, Executrix of the Estate of John Shaw, Deceased, Docket Nos. 6436, 6437, and 6438; Julia Andrews Bruce, Docket No. 18202.

2. Deferred payments under the contract were based upon the number of tons mined annually from the Mahoning mine, the mineral content of which was susceptible of accurate determination. Held, that such portion of the deferred payments received during each year as the number of tons mined during such year bears to the total determined content of the mine constitutes a return of principal and that the balance constitutes a receipt of taxable income.

JOHN W. FORD, ESQ.,
MILLARD F. TOMPKINS, ESQ.,
WALTER M. ANDERSON, ESQ.,
For the Petitioners.

L. C. MITCHELL, ESQ.,
For the Respondent.

These proceedings are for the redetermination of deficiencies in income tax as follows:

	Year	Deficiency	Overassessment
Edith Andrews Logan:			
Docket No. 5508			
(Claim filed)	1915		$18.60
Do	1916		1,441.15
Do	1917		491.73
	1918	$994.05	
	1919	14,277.92	
	1920	6,776.66	
		22,048.63	1,951.48
Henry W. Heedy:			
Docket No. 5916	1918	424.38	
	1919	291.67	
	1920	272.21	
		988.26	
William J. Hitchcock:			
Docket No. 5917	1918	7,967.60	
	1919	3,024.06	
	1920	3,144.05	
		14,135.71	
Frank Hitchcock:			
Docket No. 5918	1918	8,483.14	
	1919	4,889.75	
	1920	1,701.20	
		15,074.09	
William M. Andrews:			
Docket No. 6014	1918	135.80	
	1919	77.19	
	1920	46.76	
		259.75	
Carrie L. Shaw, executrix of the estate of John Shaw, deceased:			
Docket Nos. 6436, 6437, 6438	1918	518.60	
	1919	147.47	
	1920	77.25	
		743.32	
Julia Andrews Bruce:			
Docket No. 18302	1918	9,419.61	
	1919	11,285.51	
		20,705.12	

These proceedings were consolidated for hearing and decision. The allegations of error in the several petitions are substantially the same and are that the commissioner erred (1) in adding certain amounts to the net income reported in the returns filed by the petitioners for the years in question, under the general and erroneous description "ore payments received from the Youngstown Sheet & Tube Company less returns of capital thereon," and in adding to net income reported in the returns filed for the taxable years any sums whatever in respect to the transactions so described, and (2) in treating as taxable income for the taxable years any portion of the sums received by the petitioners during those years as part of the sale price of shares of stock in the Andrews & Hitchcock Iron Company, which were sold during the year 1916.

FINDINGS OF FACT

1. The petitioners are all citizens of the United States and residents of Youngstown, Ohio, except Julia Andrews Bruce, who is a resident of Greenwich, Connecticut.

2. Prior to March 1, 1913, and continuously to March 11, 1916, Edith Andrews Logan owned 250 shares, her mother, Louisa
31 Andrews, owned 1,180 shares, Henry W. Heedy, 100 shares, William J. Hitchcock, 1,000 shares; Frank Hitchcock, 1,000 shares; the Cleveland Trust Company, trustee for the three children of U. A. Andrews (of which William M. Andrews was one), 120 shares; and Julia Andrews Bruce, 350 shares, constituting all of the capital stock of the Andrews & Hitchcock Iron Company, an Ohio corporation, which at all said times mentioned had 4,000 shares of capital stock issued and outstanding.

3. The Andrews & Hitchcock Iron Company at all times between March 1, 1913, and March 11, 1916, owned among other assets a 12 per cent interest in the capital stock of the Mahoning Ore & Steel Company, which controlled under a lease dated April 1, 1895, and running for 97 years after said date, an iron mine located on the Mesaba Range in Minnesota, known as the Mahoning mine.

4. On March 11, 1916, all the stockholders of the Andrews & Hitchcock Iron Company entered into a certain written contract with the Youngstown Sheet & Tube Company, an Ohio corporation, providing for the sale of their stock in the Andrews & Hitchcock Iron Company to the Youngstown Sheet & Tube Company, the material portions of which contract are set forth in the findings of fact in Julia Andrews Bruce and Edith Andrews Logan, executrix, estate of Louisa Andrews, 5 B. T. A., 300. This contract made reference to a written contract dated December 16, 1914, by and between
32 the stockholders of the Mahoning Ore & Steel Company, the material portion of which is also set forth in the findings of fact in Julia Andrews Bruce et al., supra.

5. Under the said contract of March 11, 1916, the Youngstown Sheet & Tube Company paid for all the outstanding stock of the Andrews & Hitchcock Iron Company the sum of two million, two hundred thousand ($2,200,000.00) dollars in cash and further covenanted and agreed to and with the vendors of said stock as additional consideration for the said stock, as follows:

Fourth. It is understood that said the Andrews & Hitchcock Iron Company is the owner of twelve per cent or three hundred sixty (360) shares of the capital stock of the Mahoning Ore & Steel Company, a corporation of the State of Pennsylvania, having a capital stock of three hundred thousand dollars ($300,000.00) divided into three thousand (3,000) shares of the par value of one hundred dollars ($100.00) each, which said Ore and Steel Company is the owner of certain valuable mines for the production of iron ore, and that the said the Andrews & Hitchcock Iron Company, by an agreement in writing in quintuplicate bearing date of December 16th, 1914, is entitled to take each year a full quota of each grade of ore to be produced by said Ore & Steel Company in proportion to
33 the amount of stock owned by or represented for it, as provided for in said agreement, a copy of which is hereto attached and marked "Exhibit A" for the purpose of making the same a part hereof; and for the purpose of fixing the balance of the purchase price to be paid by the Youngstown Company, it is therefore further agreed between said parties as follows to-wit:

That the Youngstown Company shall, and will each year hereafter, take or cause to be taken the full quota of ore to which the said the Andrews & Hitchcock Iron Company, its successors or assigns, may be entitled, under and by virtue of the terms of said written agreement of December 16, 1914, and shall give the notice provided for in said agreement and will pay or cause to be paid to said the Dollar Savings & Trust Company for the benefit of said stockholders, and as the balance of said purchase price, each year, on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) per ton for each and every ton of twenty-two hundred forty (2240) pounds of iron ore so entitled to be taken for such year, and actually delivered by said Ore & Steel Company, it being understood that if any part of the quota for any year be left at the mine by election of the Youngstown Company, the Youngstown Company shall pay on account thereof to the stockholders in the same manner as though the same had been shipped from the mine, but shall not thereafter be required to pay any additional sum on account thereof.

34 6. The said contract of December 16, 1914, between the stockholders of the Mahoning Ore & Steel Company, which was by reference made part of the said contract of March 11, 1916, contained, among other provisions, the following:

"The tonnage of each grade to be produced annually shall be fixed by the board of directors on or before April 1st, in each year, and

notice of the fixing of said tonnage shall be mailed promptly to each stockholder.

"Each of the interests, as hereinbefore set forth, shall be entitled to take a full quota of each grade to be produced, in proportion to the amount of stock owned by or represented for them, and within fifteen days after receipt of notice referred to in preceding paragraph shall notify in writing the president of said Mahoning Ore & Steel Company, whether or not it elects to take the full quota to which it is entitled. Undesired tonnage, if any, shall be offered pro rata to the other stockholders, and such portion thereof not desired by them can be disposed of by the board of directors by reducing the originally fixed production to the extent of the unaccepted tonnage or in any other manner the board of directors may agree upon.

"The price of ores shall be fixed each year by the board of directors and shall be at or about the cost of production, including all costs, transportation, delivery, handling, etc., to the lower lake ports."

35 7. The Cleveland Trust Company on January 31, 1918, transferred and assigned to William M. Andrews a 40/4000 interest in the then unpaid portion of the sale price of said stock and terminated the trust with respect thereto.

8. On October 29, 1916, Louisa Andrews assigned and transferred to John Shaw, by way of gift inter vivos, an interest of 80/4000 in the then unpaid portion of the sale price of said stock.

9. The value on March 1, 1913, of the shares of stock owned by the petitioners and sold by them under said contract of March 11, 1916, was in excess of the following sums, respectively:

Edith Andrews Logan	250	shares	$173,089.80
Henry W. Heedy	100	"	69,235.93
William J. Hitchcock	1,000	"	692,359.25
Frank Hitchcock	1,000	"	692,359.25
The Cleveland Trust Company, trustee for William M. Andrews	40	"	27,694.37
Julia Andrews Bruce	350	"	244,703.70

10. The value on October 29, 1916, of the 80/4000 interest in the unpaid portion of the sale price of said stock acquired by John Shaw by gift from Louisa Andrews on that date was in excess of $11,388.74.

11. Since the sale of said shares of stock under the contract of March 11, 1916, the petitioners have respectively received the following sums on account of the purchase price of said stock,
36 down to and including the year 1920, the amounts shown for 1916 in each case representing the stockholder's share of $2,200,000 paid in cash under the contract of March 11, 1916:

Edith Andrews Logan	1916	$137,500.00
	1917	9,900.00
	1818	11,250.00
	1919	8,995.50
	1920	5,444.30
Henry W. Heedy	1916	55,000.00
	1917	3,960.00
	1918	4,500.00
	1919	3,598.20
	1920	2,177.73

William J. Hitchcock	1916	$550,000.00
	1917	39,600.00
	1918	45,000.00
	1919	35,982.00
	1920	21,777.25
Frank Hitchcock	1916	550,000.00
	1917	39,600.00
	1918	45,000.00
	1919	35,982.00
	1920	21,777.25
William M. Andrews	1916	22,000.00
	1917	1,584.00
	1918	1,800.00
	1919	1,439.28
	1920	871.09
John Shaw	1917	3,168.00
	1918	3,600.00
	1919	2,878.56
	1920	1,742.18
37 Julia Andrews Bruce	1916	192,500.00
	1917	13,860.00
	1918	15,750.00
	1919	12,593.70

12. The total of the sums received by the several petitioners as the result of the sale of said stock owned by them and sold under the contract of March 11, 1916, down to and including the year 1920, was in each case less than the value on March 1, 1913, of the stock sold and less than the cost thereof, and in the case of John Shaw was less than the value of his interest at the date he acquired it by gift from Louisa Andrews.

13. On March 11, 1917, Louisa Andrews, Julia Andrews Bruce's mother, died, leaving a last will and testament which was duly admitted to probate and under which Julia Andrews Bruce received by bequest a 550/4000 interest in any payments that might subsequently become due under the said contract of March 11, 1916.

14. The value of the said 550/4000 interest so acquired by Julia Andrews Bruce under her mother's will was fixed by the Commissioner of Internal Revenue for the purposes of the Federal estate tax imposed upon the estate of Louisa Andrews at $277,164.50.

15. Since the death of her mother, Louisa Andrews, on March 22, 1917, Julia Andrews Bruce, down to and including the year 1920, has received the following sums under said contract of March
38 11, 1916, on account of the 550/4000 interest in the future payments under said contract acquired by her under her mother's will:

1919	$19,790.10
1920	11,977.49

16. The total of the sums so received by Julia Andrews Bruce since her mother's death by virtue of the 550/4000 interest in the future payments under the contract of March 11, 1916, acquired by Julia Andrews Bruce under her mother's will was less than the value of the said 550/4000 interest as fixed by the commissioner for the purposes of the Federal estate tax upon the estate of Louisa Andrews and less than the value of said interest at the date it was acquired by inheritance from her mother.

17. The several petitioners, between March 1, 1913, and December 31, 1920, kept no books and their returns for Federal income tax purposes for the years 1916 to 1920, inclusive, were made on the basis of cash receipts and disbursements.

18. On March 11, 1916, the Mahoning Ore & Steel Company's property consisted of approximately 1,000 acres of leased mineral land and at that time between 400 and 500 acres were totally or practically unexplored.

19. Fifty per cent of the stock of the Mahoning Ore & Steel Company in 1916 was held by the Cambria Steel Company and the remainder by other steel companies.

39 20. Until 1909 or 1910 the policy of the Mahoning Ore & Steel Company had been one of conservation, the production running between 1,000,000 and 1,500,000 tons per annum.

21. In 1911, 1912, and 1913, owing to the increasing tax burden and the change of the control of the Cambria Steel Company, the company entered upon extensive stripping operations which placed it in a position to produce 3,000,000 tons a year.

22. Under the agreement of December 16, 1914, the amount of tonnage to be produced annually by the Mahoning mine was left to the determination of the board of directors of that company.

23. A difference of opinion existed between engineers and experts qualified by education and training in the iron mining industry employed by the Mahoning Ore & Steel Company, on the one hand, and by the commissioner, on the other, as to the estimated annual production of the Mahoning mine and its life as of March 11, 1916.

24. Engineers employed by the commissioner estimated that at the date of the contract of March 11, 1916, the ore reserves of the Mahoning Ore & Steel Company were 82,858,535 tons; that the average annual future production from said mine would be 1,841,300 tons; and that the life of the mine was 45 years from March 11, 1916.

40. 25. The estimate mentioned above and adopted by the commissioner as a basis for determining deficiencies in the income tax of the petitioners was based upon data furnished by the engineers of the Mahoning Ore & Steel Company to the respondent to enable him to fix the depletion rate for the Mahoning Ore & Steel Company. It was based upon the content of recoverable ore in only approximately 620 acres out of the entire property leased by the company.

26. Since fixing the deficiency in the case of Edith Andrews Logan, the commissioner in a proceeding in which the depletion rate for the Mahoning Ore & Steel Company was changed, based upon data furnished by the company and the opinions of duly qualified engineers and experts employed by him, found that the life of said mine was 40 years from March 1, 1913, and that the estimated ore reserves of said mine on March 1, 1913, were 88,561,533 tons. The tonnage

mined from the Mahoning mine from March 1, 1913, to March 11, 1916, was 5,039,655 tons.

27. The actual ore in tons mined annually for the Mahoning Ore & Steel Company between 1913 and 1926, inclusive, was as follows:

1913	1,515,428	1920	1,720,537
1914	1,212,287	1921	303,020
1915	2,311,940	1922	1,011,204
1916	2,215,788	1923	3,029,865
1917	2,525,144	1924	1,717,092
1918	2,019,481	1925	1,099,133
1919	1,217,167	1926	1,813,811

28. Assuming that the said Mahoning Mine had ore reserves on March 11, 1916, of 82,858,535 tons, and further assuming that all said ore that would be mined, and 12 per cent thereof, namely, 9,942,564.2 tons, would be delivered to Youngstown Sheet & Tube Company, the total amount which would be received under the provisions of the contract of March 11, 1916, by all the vendors of said stock and their successors in interest would be the sum of $5,965,814.52 at the rate of 60 cents per ton.

29. The present worth of the sum of $5,965,814.52, based upon the assumption that the amount was to be received in equal annual installments during 45 years, discounted at 6 per cent, with provision for a sinking fund at 4 per cent, was on March 11, 1916, $1,942,111.46, which is the value of the contract at March 11, 1916, determined by the commissioner and used by him in computing deficiencies in tax.

OPINION

SMITH: In the petition of Edith Andrews Logan it is stated that "the tax in controversy is income tax for the years 1915 to
42 1920, inclusive, and is more than $10,000, to wit, $22,048.63."

The notice of deficiency attached to the petition shows overassessments for the years 1915, 1916, and 1917, covered by claims filed in the aggregate amount of $1,951.48, and deficiencies in tax for the years 1918, 1919, and 1920 in the aggregate amount of $22,048.63. The pleadings do not present basic facts showing that the board has any jurisdiction to determine the correct tax liabilities for the years 1915, 1916, and 1917, and the petitioner in her brief makes no reference to those years. The appeal is accordingly dismissed in so far as it relates to the years 1915, 1916, and 1917.

The remaining issues presented by these proceedings are the same as those presented in Julia Andrews Bruce, et al., 5 B. T. A., 300, wherein we held that the transaction which took place in 1916 was a completed sale and that the amounts of money received by the petitioners during the tax years under the contract of March 11, 1916, were in part a return of capital and in part taxable income. It was argued before the board in those proceedings, as it is argued by counsel for the present petitioners, that the interest of the petitioners in the contract of March 11, 1916, had no fair market value in 1916 and that, therefore, the transaction was not a closed one and that the

petitioners were not liable to income tax upon moneys received in future years under the contract until they had recovered back the cost or fair market value on March 1, 1913, whichever was higher.

In the opinion we stated:

43 "The petitioners have also raised the point that there was no market value for the contract right received by Julia Andrews Bruce and Louisa Andrews in 1916. The only testimony offered in support of these contentions was by Hitchcock, former president of the Andrews & Hitchcock Iron Company. This witness testified that in the negotiations for the sale of the stock there was no discussion concerning a full cash payment, because the buyer, the Youngstown Sheet & Tube Company could not afford to pay cash in full. This is all the testimony offered in support of the allegation that the contract to receive future payments had no market value."

The present petitioners contend that unlike the Julia Andrews Bruce case, supra, they have offered affirmative proof showing that the contract of March 11, 1916, under which their shares of stock were sold, in so far as the future indeterminate payments were concerned, had no fair market value.

Frank Hitchcock, the president of the Andrews & Hitchcock Iron Company on March 11, 1916, testified at the hearing of the present cases:

"Q. Mr. Hitchcock, at that time, namely, March 11, 1916, did you know of any market where you could have obtained, or did you know of any market where could be sold, an interest of 12% of the stock of the Mahoning Ore & Steel Company?—A. No; not at its value.

44 "Q. Mr. Hitchcock, in 1916, was there any price established by public sale or sales in the way of ordinary business, of similar contracts to this contract of March 11, 1916, by which the fair market value of the contract at that time, at the time it was made, could be determined?—A. No.

"Q. Was there in 1916 any general market for contracts of this character, and any established or current market price?—A. No."

John B. Putman, connected with Pickands, Mather & Company, Cleveland, Ohio, likewise testified that in his opinion there was no fair market for the interests of the several petitioners' in the contract of March 11, 1916; that the vendors on any sale of this contract in 1916 could not have readily realized in cash or its equivalent its real value.

J. C. Agnew, mining engineer who was connected with the Mahoning Ore & Steel Company from 1904 to 1923, testified:

"Q. In 1916, was there any price established by public sales or sales in the way of ordinary business, of similar contracts, by which the fair market value of that contract at the time it was made could be determined?—A. No.

"Q. Was there, in 1916, any general market for contracts of that character, and any published or current market price for the same?—A. Not to my knowledge.

"Q. In your opinion, could the vendors or sellers under that
45 contract, on any sale of the contract, have realized in 1916 in cash or its equivalent its real value?—A. No; I do not think so."

Of the above witness, Hitchcock and Agnew testified before the board in Julia Andrews Bruce, et al., supra. The only additional witness for the petitioners in the present proceedings is John B. Putnam. He did not profess to be an expert on any subject connected with mining and did not claim to have anything more than general information as to any subject connected with these proceedings. He stated that he was generally familiar with iron-ore contracts. He also stated:

"There have been sales of iron ore mines, but I am not familiar with any except in a general way."

Two mining engineers testified for the respondent that in their opinion it was practicable and feasible to estimate both the reserve and probable life of the Mahoning mine. Both of these men were familiar with the property in controversy. One of the engineers had taken part in formulating the commissioner's determination as to the probable life of and as to the tonnage of ore in the mine. He stated that the pit operated by the Mahoning company adjoined another pit known as the Hall Rust mine, on adjoining property, and that the two properties constituted one mine from a physical standpoint and that it was the largest developed iron mine in the
46 United States. The iron is found in a well-defined formation and is one of the best grades of iron ore in the United States. Above the iron ore is the surface of overburden of glacial drift, varying from 5 to 30 feet in thickness. He stated:

"The physical conditions make it feasible to estimate the ore content. You can make a very accurate estimate of it. I would say the degree of accuracy obtained in estimating ore reserves in this property will be much higher than at any other mine that I know of, because of the geographical conditions and the development of the work, the drill work, and the activity of adjacent properties * * *. I do not know of any mining section where it is as easy to make an estimate of ore reserve as it is on the Mesaba."

The stipulation filed in these proceedings shows that the respondent estimated ore reserves and probable life as of 1916 and also as of 1913. The estimate of reserve in 1913 when modified by the ore mined between 1913 and 1916, is within one-half of one per cent of the 1916 estimate. In 1913 probable life was estimated at 40 years and in 1916 at 45 years. On this point one of the engineers for the respondent testified:

"The commissioner's appraisals of 40 years as of March 1, 1913, and 45 years as of March 11, 1916, are very consistent because
47 they were made as of different basic dates. In each case you had a different set of facts on which to base the valuation. In the later appraisal you had additional history of three years to con-

sider. The production for those three years was slightly less than 2,000,000 tons a year and during those three years the demand for iron ore was about the average."

All of the mining engineers who testified before the board agreed that the production of a mine of the character of the Mahoning mine here involved is strongly influenced by the general conditions of business in the country. They were agreed that in times of prosperity the production will be greater than in times of depression. J. C. Agnew, testifying for the petitioners, stated:

"The demand for iron ore bears a very close relation to the general prosperity of the country * * *.

"In estimating the future production of the Mahoning mine as of 1916 the general demand in this country for iron ore would certainly be an important factor. Another important factor would be the condition of the industry in this country, whether times were prosperous or otherwise."

The two government engineers concurred in this view.

Upon the basis of data furnished by the Mahoning Ore & Steel Co., the respondent determined that the ore in place as of March 11, 1916, was 82,858,535 tons. It is in evidence that this
48 estimate did not take into consideration ore, if there was any, in approximately 400 acres of land controlled by the company. No evidence has been adduced before the board that would prove the inaccuracy of the estimate. The doubt, if any exists, is as to the length of time it will take to mine the ore. Upon the basis of data furnished by the Mahoning Co. the respondent estimated that the life of the mine would be 45 years from March 11, 1916, and that the average annual production would be 1,841,300 tons. During the eleven-year period from 1916 to 1926, inclusive, the total production was 19,272,242 tons, or an average annual production of 1,752,000 tons.

The contract which the stockholders of the Andrews & Hitchcock Iron Co. had with the Youngstown Sheet & Tube Co. was that they should receive 60 cents per ton upon their 12 per cent interest in the ore mined from the Mahoning mine. The important question in the case is as to whether that contract had a fair market value as of March 11, 1916. The petitioners contend that they could not have gotten a fair market value for their interests in the contract if they had attempted to sell them. Witnesses for the petitioners believed that the true value of the interest of each of the petitioners was much in excess of what each could have sold it for. This question of belief does not, however, in our opinion satisfactorily establish that the interests had no fair market value. In 1916 it could be fore-
seen that each of the petitioners would receive considerable
49 amounts of money under the contract during the years immediately succeeding 1916. It is hardly probable that persons conversant with the contract would not have given something for the interests of the several petitioners therein. Statements that the contract had no value because in the opinion of certain witnesses the

interests of petitioners therein could not have been sold at their full market value is not satisfactory evidence that they did not have a fair market value.

In support of their contention that the contract of March 11, 1916, had no fair market value in 1916, the petitioners cite the decision of the court in Bourne v. McLaughlin, 19 Fed. (2d), 148. We are of the opinion that that case is readily distinguishable from the cases at bar and is not controlling here. In that case the court expressly stated that the stock could not have been disposed of "except at such a sacrifice as to amount to a virtual donation," and that attempts to sell the stock were unsuccessful. There is no such evidence before the board in the proceedings at bar.

Upon the record made we are of the opinion that the contract received by the petitioners as a part consideration for their holdings in the Andrews & Hitchcock Iron Co. had a determinable fair market value when received by them in 1916. No evidence has been adduced that the determination of the commissioner of the fair market value of the interests of the several petitioners at the basic dates were in error, and in the absence of such evidence the determinations of the respondent of such values are approved.

50 The petitioners' contention that they derived no taxable income from payments made to them during the taxable years because up to the close of 1920 no one of them had received under the contract the admitted value of the property sold either as of March 1, 1913, or March 11, 1916, is very similar to that which was made before the board in Ruth Iron Co. et al., 4 B. T. A., 1151, wherein it appeared that in January, 1913, the petitioners sold certain ore-bearing property and each of them received in exchange for its or his interest therein a certain amount in cash and 41 noninterest-bearing promissory notes, payable annually thereafter, indorsed by the United States Steel Corporation and further secured by a vendor's lien upon the property. Upon the facts presented we held that the amounts received by the petitioners upon the payment of their respective notes in the years 1919, 1920, 1921, and 1922 in excess of the fair market value of such notes on March 1, 1913, which value was in excess of cost, was taxable income. One of the petitioners in that case was Francis S. Kosmerl, and from the adverse decision of the board, appealed the case to the Circuit Court of Appeals for the Seventh Circuit. In an opinion handed down February 18, 1928, the order of the board was affirmed. In the course of the opinion the court stated:

"For petitioner a witness testified generally that at the time the notes were given the ore body was worth more than 35 cents per ton. But the ore at that time was plainly not worth that

51 much to the owners, who had optioned it under the lease at 35 cents a ton, not payable in cash, but as and when it should be mined, over a period which, on January 1, 1913, had yet 41 years to run; so that while the lessee had the right to exhaust the property at 35 cents per ton, this might not, and probably would not,

have been payable until many years after the date when the lease was abandoned and the sale consummated. So it appears that the actual consideration which passed from the owners was not a present 35 cents per ton, but that price over a period up to 41 years thereafter, thus greatly reducing the 35 cents per ton value of the consideration which passed in payment for the notes.

"And so with respect to the notes themselves, which, by their terms, matured up to 40 years from their date, without interest. That the notes were good is quite beyond dispute—good, however, only for their face value at maturity, but surely not good for their face value when made. That a note, however absolutely good the security, due 40 years from its date, without interest, is not worth its face at time of making is apparent from the mere statement. And so with the notes in question, paid in 1921 and 1922, eight and nine years from their date. Conceding these notes to have been capital assets of the taxpayer on their date, they were capital assets not for their face value but for the materially less amount which
52 the notes were then actually worth; and in their payment at maturity there was plainly gain, profit or income to the extent of the difference.

"In Platt v. Bowers, 13 F. (2nd), 951, the court dealt with a very similar situation, and held that while the annually maturing obligations represented capital assets, and were not taxable as gains, profits, or income, yet where the obligations were for serial annual payments without interest, under the acts of 1918 and 1921 there was, upon conversion of the obligations through their payment, profit to the extent of the difference between the value of the obligations on March 1, 1913, and the amount so realized thereon."

The above-referred to case is not an exact parallel to the cases at bar, for there the petitioners parted with a note during each taxable year and received the face value thereof. Here the petitioners parted with shares of stock in Andrews & Hitchcock Iron Company in 1916 for a cash consideration and a contract entitling them to receive an amount per annum to the end of the lease held by the Mahoning Ore & Steel Co. based upon the amount of ore mined during each year. The number of tons of ore in the mine was susceptible of accurate determination and the amount of the ore to be mined annually over a period of years was likewise susceptible of determination. If the difference between the present worth of the noninterest-bearing notes in 1913 in the Kosmerl appeal and the amount received
53 during the taxable year was income of the taxable year we think that the application of the same principle to the proceedings at bar requires the petitioners to return as taxable income a portion of the amount of royalties received each year. This was substantially the decision of the Circuit Court of Appeals, Third Circuit, in Kate W. Rosenberger v. McCaughn, March 3, 1928 (not yet reported). The plaintiff in suing to recover the tax paid on amounts received under a mining lease entered into prior to March

1, 1913, claimed that inasmuch as under the Pennsylvania law the lease was treated as a sale of coal in place, the payments received should be treated as a return of capital. In the course of the opinion the court stated:

"Reverting to the plaintiff's contention that all payments she had received under the instrument here in question were tax free because they were part payments of the purchase price of property sold prior to March 1, 1913, still—always keeping in view the nature of mining, the source of the proceeds—we think each payment represented in some measure both capital and increment, capital because it stood in the place of coal and increment because in the payments running through ninety-nine years interest on the capital must inevitably have been included, and that this increment or interest was a gain "derived" within the generalization of the statutes "from any source whatever" and was income in substantially the
sense of New Creek Coal Company v. Lederer, 295 Fed. 433
54 (4 Am. Fed. Tax. Rep. 3769). The plaintiff can very properly demand that the capital included in her proceeds from mining shall not be taxed. United States v. Ludey, 274 U. S. 295 (6 Am. Fed. Tax Rep. 6754); New Creek Coal Company v. Lederer, supra. But when the capital in the proceeds has been determined and set aside the balance is income and is the very thing on which the government lays its hands and exacts a tax. Stratton's Independence v. Howbert, 231 U. S. 399 (Am. Fed. Tax Rep., 2883); * * *"

See also Florence L. Klein, 6 B. T. A., 617.

At the hearing of these proceedings counsel for the petitioners stated that they desired merely to submit to the board these cases on the sole and particular question whether the 1916 transaction was a closed transaction and that if upon the evidence submitted the board was of the opinion that it was a closed transaction then the deficiencies must be redetermined in accordance with the board's decision in Julia Andrews Bruce, et al., supra, in which the same contract was involved. Counsel for the respondent objected, however, to the redetermination of the deficiencies in accordance with the Julia Andrews Bruce, et al., supra, decision and contended that the deficiencies should be redetermined to be the amounts found by the respondent.

In Julia Andrews Bruce, et al., supra, we held:

"* * * The commissioner in his determination of the
55 deficiency has determined the fair market value of the right to receive future payments, and from the evidence presented we can not say that his determination is not correct. A portion of each payment under the contract was a return of capital and a portion represented gain. The commissioner has determined what portion is gain by dividing the 1916 value of the contract by the total tonnage to be obtained, reaching the conclusion that the payment for each ton represents 19.53 cents return of principal and 40.47 cents income,

or, in other words, that each payment, whether made one year after the agreement was made or 45 years thereafter, is made up 35.554 per cent return of principal and 67.446 per cent income.

"The payments to all the stockholders were estimated by the commissioner to be $132,573.60 annually for 45 years. These payments were reduced to present worth, using a discount of 6 per cent on future payments with a 4 per cent return on sinking fund. It is evident that the present worth of the payment to be received at the end of the first year differs substantially from the present worth of the payment to be received 45 years in the future. It is further evident that the present worth of all of the payments is the sum of the present worth of each annual payment, proper adjustment for the sinking fund being made. In determining what portion of the payment represented a return of the 1916 value, the commissioner has made the allocation between principal and gain
56 as if the present value in 1916 of each of the annual payments to be received was exactly the same. * * *"

Our question now is whether we were correct in reaching the above conclusion. It will be noted from the foregoing that for the purpose of determining the amount of income received by each petitioner from the royalty payments, the commissioner considered that of each royalty payment received a part represented a return of the value of the contract on April 11, 1916, and the balance represented income. The amount of each royalty payment which represented a return of capital was determined by dividing the fair market value of the contract on April 11, 1916, by the estimated tons of ore in the mine on that date. The difference between the royalty payment of 60 cents and the foregoing amount was taken as the income received on account of each ton of ore mined. The income for a given year was obtained by multiplying the unit of income for a single ton of ore by the total number of tons mined in a given year. The board rejected the respondent's basis and held that—

"The proper manner in which to determine what portion of the payment is principal is to split up the total 1916 present worth into its component parts and to treat the present value of the first year's payment as a return of principal upon the first 1,841,300 tons (the estimated annual production) mined, the present value of the
57 second year's payment as a return of principal upon the second 1,841,300 tons mined, and similarly each year until the mine becomes exhausted, or the principal is all returned."

In this manner the greater part of the amounts received in the first years would represent a return of principal and a small part income, whereas during the last years of the existence of the contract the reverse situation would be true regardless of the income produced by the contract in the various years. For example, under this theory, the amount to be accounted for each year would be $1,064,600, and in the first year approximately 94 per cent would be considered a return of principal and approximately 6 per cent income, whereas in the

forty-fifth year approximately 6 per cent would represent a return of principal and approximately 94 per cent would represent income.

Does the foregoing decision of the board afford a reasonable basis for the determination of the amount of income of the petitioners from the royalty payments received? It is believed that this question may best be answered by keeping in mind the nature of the asset received when the 1916 transaction was effected. What happened in 1916 was that certain stock was sold for $2,200,000 and a contract which the respondent determined had a fair market value at date of receipt of $1,942,111.46, which value we have approved for lack of evidence showing error on the part of the respondent in making such determination. The contract in question was an income-pro-
58 ducing asset in that under its terms the owners thereof were entitled to receive income to the extent of 60 cents a ton on a certain part of the ore that was to be mined and the contract was exhaustible in that it had a value only so long as there remained ore to be mined.

The board is of the opinion that a proper solution to the question of what part of the royalties received constituted taxable income lies in considering the entire amount of royalties received in a given year as includable in gross income and then in permitting a reasonable deduction therefrom in each year for the exhaustion of the contract. Section 213 (a), revenue act of 1918, provides in part that gross income—

"Includes gains, profits, and income derived from * * * trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer * * *."

We can not escape the conclusion that the foregoing provision would require all royalties received to be included in the gross income of the recipients. But all of the amounts received would not be subject to tax for the reason that in the production of this
59 income, the asset which produced this income was gradually being exhausted and Congress provided in section 214 (a) (8), revenue act of 1918, that there shall be allowed as a deduction from gross income "A reasonable allowance for the exhaustion * * * of property * * *." No one would seriously question that a contract is property, and we think it equally clear that the contract in question is property which is being exhausted in the production of income and, consequently, that a deduction on account thereof is justified under the foregoing provision of the statute. See Lynch v. Alworth-Stephens Co., 267 U. S. 364. The difference between the royalties received and the allowance for exhaustion would constitute gain derived from capital which would satisfy the classic definition

of income as laid down in Stratton's Independence v. Howbert, 231 U. S. 399, and since often reiterated, to the effect that income is the "gain derived from capital, from labor, or from both combined." Here the gain is derived from capital, which capital is in the form of a contract which was received in part payment for stock which was sold and which will be productive of income until exhausted.

Our next question is what constitutes a reasonable allowance for the exhaustion of the contract. Since the value attaching to the contract is on account of royalties to be received as the ore is mined, we are of the opinion that a reasonable allowance in each year is determinable upon the basis of the ore mined. It is true that we are not here seeking to determine depletion in the case of a
60 mine, yet the relationship between the exhaustion of the mine and the exhaustion of the contract are such that we think the same principles would be applicable in each case. The method for computing the deduction for the depletion of mineral deposits, as set out by the commissioner in his regulations, is on the basis of the annual production. Article 210 (b), Regulations 45, provides:

"When the value of the property at the basic date has been determined, depletion for the taxable year shall be determined by dividing the value remaining for depletion by the number of units of mineral to which this value is applicable, and by multiplying the unit value for depletion, so determined, by the number of units sold within the taxable year. * * *"

See also articles 201, 202, 203, and 204 of the same regulations. In New Creek Co. v. Lederer (C. C. A.), 295 Fed. 433, the court had before it the question of the reasonableness of the commissioner's regulations with respect to depletion under the revenue act of 1916, which embody the same principle which appears in the aforementioned regulations (in so far as material to this discussion), the Government there contending that—

"Royalties represented both capital and income and that the allowance for capital depletion which the statute authorized was to be determined by the value in the ground of each ton of
61 coal on March 1, 1913, * * * multiplied by the number of tons mined in the year for which the tax was payable."

In approving the commissioner's regulations as providing a reasonable depletion allowance, the court said:

"* * * On the theory of the statute, as we read it, depletion allowance was intended as a return to the taxpayer of the original cost of the coal so that he may be taxed not on the whole of its sale price in the event that he is an operating owner, or on the full amount of royalties if he is a lessor, but that he may be taxed on the difference between the cost (capital) and the sale price or royalties received (income). (Of course in estimating income on sale price other factors enter.) If he were allowed to deduct in each year the full amount of the sale price or the full amount of the royalties received (as the plaintiff here claims), the practical effect would be

that he would, for many years, pay no tax at all, and this regardless of the fact that the total sale price (or total royalties) may, ton by ton, show a profit over the original capital cost. It is this profit or net income annually earned which the act taxed annually. And in this regard we see no distinction in the application of the principle to a mine owner whose income is royalties and to a mine owner whose income is derived from working the mines and selling the
62 coal. The only difference is that in the latter more factors enter into the calculation. The principle is the same.

"We do not find that the rules and regulations prescribed by the Secretary of the Treasury for the enforcement of the allowance for depletion under the provisions of the revenue act of 1916 are, in view of the subject matter of taxation, unreasonable, or that by these rules the taxable was deprived of the deduction which the statute allowed."

Likewise, in Lynch v. Alworth-Stephens Co., supra, where it was held that a lessee of a mine is entitled to an allowance for depletion, the court said:

"It is said that the depletion allowance applies to the physical exhaustion of the ore deposits, and since the title thereto is in the lessor, he alone is entitled to make the deduction. But the fallacy in the syllogism is plain. The deduction for depletion in the case of mines is a special application of the general rule of the statute allowing a deduction for exhaustion of property. While respondent does not own the ore deposits, its right to mine and remove the ore and reduce it to posesssion and ownership is property within the meaning of the general provision. Obviously, as the process goes on, this property interest of the lessee in the mines is lessened from year to year, as the owner's property interest in the same
63 mines is likewise lessened. There is an exhaustion of property in the one case as in the other; and the extent of it, with the consequent deduction to be made, in each case is to be arrived at in the same way, namely, by determining the aggregate amount of the depletion of the mines in which the several interests inhere, based upon the market value of the product, and allocating that amount in proportion to the interest of each severally considered."

The board is convinced that the foregoing principles which were considered applicable in determining a reasonable allowance for the depletion of a mine would apply with equal force in determining the reasonable allowance for the exhaustion of a contract which is dependent for its value upon the right to receive a royalty upon the content of a mine as the ore is mined and which value will be reduced or exhausted as the ore is taken from the ground.

While in the instant case the respondent divided the royalties received as between a return of capital and income, the result reached is the same as if the entire royalties received had been included in gross income and an allowance for exhaustion of the contract treated as a deduction from this gross income. In fact, the end sought in an exhaustion allowance is to have the capital sum invested in a

wasting asset returned to the taxpayer as a charge against income earned by the asset and in this way avoid taxing a return of capital. The entire income earned is not taxable, but only so much thereof as does not represent a return of capital. The return
64 of capital is represented in the case at bar by the exhaustion allowance, which, when deducted from the total royalties received, will produce the same amount of taxable income as determined by the respondent. See the Royal Collieries Company, 1 B. T. A. 369. The action of the respondent is accordingly sustained.

In the instant proceedings we are not attempting to lay down a rule for the determination of a reasonable amount for depletion in the case of a mine. Nor do we attempt to determine what would be a reasonable allowance for the exhaustion of a contract where the facts are substantially different from those which obtain in the instant proceedings. All that we do determine is that the method invoked by the respondent of computing the income from the contract is reasonable and should be sustained in the absence of evidence of error on the part of the respondent in making such determination.

The foregoing principles as to the manner in which income from the contract shall be reported are, of course, inconsistent with the method approved by the board in Julia Andrews Bruce, et al., supra, in that under the Bruce case, neither the income to be reported nor the allowance for exhaustion bear any necessary relation to the income received in a given year, nor to the extent to which exhaustion has been suffered in the production of this income. It is true that in the valuation of this contract we have based our conclusion as to the fair market value upon the basis of the present worth of the royalties which it was estimated would be received over the life
65 of the contract, but because we followed this method of valuation does not mean that where, for example, the same tonnage of ore was mined in the first year and in the last year of the existence of the contract the greater part of the royalties in one case would be capital and in the other case, income. The net income in each case would be the same. The value which we arrived at was such a value as we considered would have resulted had the contract been offered for sale by a person willing to sell and had been acquired by a person willing to buy. In effect, the method followed and the result reached is not essentially different from that in the case of the valuation of a leasehold at March 1, 1913. In such case a value is often assigned to the leasehold for the reason that had it been necessary to renew the lease on that date, the rental to be paid would have been greater than was being paid under the terms of the lease negotiated prior to March 1, 1913, and, consequently, we say that there will be a saving over the remaining life of the lease of the difference between the two rental amounts, which reflects a March 1, 1913, value of the leasehold. Even though such value may be arrived at on the basis of the present worth of the savings over the period of years, we have never heard it contended that the deduction allowable in a given year

on account of the exhaustion of such a leasehold value should bear any relation to the present worth value of the saving for such year. The basis for exhaustion of such a leasehold which has been recognized repeatedly by the board and the courts is either a time
66 or production basis depending upon the nature of the asset, and that, regardless of the fact that in determining the March 1, 1913, value, the value of the saving for the first year would be greater than for any succeeding year. We do not conceive that the situation with respect to the exhaustion of the contract in question would have been different had the valuation which we arrived at been upon the basis of an offer to buy the contract rather than the present worth method. An offer to buy would necessarily have been predicated upon the profits to be realized from the contract and the profits which were expected to be realized one year hence would have been a greater present value than the profits which were expected to be realized forty-five years from that time, yet had the valuation been fixed on such an offer, it is hardly to be supposed that it would be seriously contended that the income to be reported and the exhaustion to be allowed would bear any relationship to such values. To the extent, therefore, that the opinion in Julia Andrews Bruce, et al., supra, is in conflict with the views hereinbefore expressed, the same is overruled.

Reviewed by the board.

Judgments will be entered for the respondent.

Dissenting opinion

PHILLIPS, dissenting in part: The difficulty I encounter in the present case is in reconciling the method by which the capital value of the contract is determined with the method by which the
67 capital returned by each payment is computed. In valuing the contract a method is used which recognizes that payments to be received in the future must be discounted to their present value. (Findings 28 and 29.) Upon this basis it is recognized that the right to receive royalties from the ores to be mined in the first year of operations is much more valuable than the right to receive royalty from an equal number of tons of ores to be mined several years later. The value of the contract is determined to be the sum of the present value of these future payments. (Findings 29.) In this manner the value of the contract is determined by assigning a capital value to the royalty upon each ton of ore to be mined in the future, a greater capital value per ton being assigned to the royalty from the first ore mined than to the royalty from the ore which is mined later. It seems to me that if we are to use this method of determining the capital value of the contract, we are not justified in departing from it when the royalties are received and we are called upon to determine what portion of the amount received from each ton mined represents capital value.

The rule adopted by the commissioner and followed by the board by which a uniform value is assigned to the royalty right in each ton of ore, whether mined in the first year or the last year of operations, may be proper in a large majority of cases, but it seems to me that it cannot properly be applied where, as here, in determining the capital value of the contract, capital values have been
68 assigned to the right to receive royalties on these ores which vary according to the time when the ores will be mined. It is my opinion that in such a case the petitioners have received income only to the extent that the royalties received in the taxable years exceed what has been determined to be the present value, at the time the contract was made, of the right to receive the royalties on an equal number of tons of ore. The computation of income upon this basis is no more difficult than the computation of the present worth of the right to receive royalties; it requires, in fact, nothing more than the use of the same tables used in the computation of value.

This principle has received the sanction of the courts in Hull v. McHale (United States District Court for the Eastern Division of the Northern District of Illinois), not reported, which was affirmed by the Circuit Court of Appeals for the Seventh Circuit in McHale v. Hull, 16 Fed. (2nd) 781, and followed in Spalding v. Reinicke, not reported, which arose in the same district.

TRAMMELL agrees with this dissent.

Now, October 3, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

B. D. GAMBLE,
[SEAL.] *Clerk, U. S. Board of Tax Appeals.*

69 Before United States Board of Tax Appeals

Washington

Docket No. 5508

EDITH ANDREWS LOGAN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated June 14, 1928, it is

Ordered and decided: That, upon redetermination, there are deficiencies as follows:

1918	$994.05
1919	14,277.92
1920	6,776.66

The proceeding insofar as it relates to the years 1915, 1916, and 1917 is dismissed for lack of jurisdiction.

(S.) CHARLES P. SMITH,
Member, United States Board of Tax Appeals.

Dated Washington, D. C.

70 Enter:

Entered June 15, 1928.

A true copy.

Teste:

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, October 3, 1929, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Stipulation as to court of review

Filed Dec. 13, 1928

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective attorneys, that
71 the decision of the United States Board of Tax Appeals in said cause, dated June 15, 1928, and redetermining deficiencies in income taxes against the above-named petitioner for the calendar years 1918, 1919, and 1920, in the amounts of $994.05, $14,277.92, and $6,776.66, respectively, may be reviewed by the United States Circuit Court of Appeals for the Second Circuit.

This agrement is made under and pursuant to the provisions of section 1002(d) of the revenue act of 1926.

MILLARD F. TOMPKINS,
E. H. MCDERMOTT,
JOHN ENRIETTO,
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Dated this 12th day of December, A. D. 1928.

Now, October 3, 1929, the foregoing stipulation certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

72 Before United States Board of Tax Appeals

[Title omitted.]

Petition for review

Filed Dec. 13, 1928.

To the Honorable the JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

Your petitioner, Edith Andrews Logan, respectfully shows:

I. JURISDICTION FOR REVIEW

This is a proceeding for review by the United States Circuit Court of Appeals for the Second Circuit of a decision of the United States Board of Tax Appeals entered on the 15th day of June, 1928, and redetermining deficiences in income taxes against your petitioner for the calendar years 1918, 1919, and 1920 in the amounts of $994.05, $14,277.92, and $6,776.66, respectively.

Your petitioner at the time of filing this petition is and for a considerable time prior thereto was a citizen of the United States
73 and an inhabitant of New York City, New York. On the 12th day of December, 1928, counsel for petitioner and counsel for respondent entered into an agreement, under and pursuant to the provisions of section 1002(d) of the revenue act of 1926, that said decision of the United States Board of Tax Appeals may be reviewed by this court.

II. NATURE OF CONTROVERSY

The controversy before the United States Board of Tax Appeals concerned the propriety of the action of the Commissioner of Internal Revenue in treating as taxable income for the years in question any portion of the sums received by petitioner during those years as part of the sale price of shares of stock in the Andrews & Hitchcock Iron Company, which were sold during the year 1916 under the following circumstances:

Prior to March 1, 1913, and continuously to March 11, 1916, petitioner owned 250 shares and her mother, Louisa Andrews, owned 1,180 shares of the capital stock of the Andrews & Hitchcock Iron Company, an Ohio corporation, which at all times mentioned had 4,000 shares of capital stock issued and outstanding. Said Andrews & Hitchcock Iron Company at all times between March 1, 1913, and March 11, 1916, owned, among other assets, twelve per centum (12%) of the capital stock of the Mahoning Ore & Steel Company, a Pennsylvania corporation, which held under lease dated April 1, 1895, and running for 97 years after said date, certain mineral lands in the Mesaba Range of Minnesota.

74 Under a certain contract of December 16, 1914, between the stockholders of said Mahoning Ore & Steel Company, in-

cluding said Andrews & Hitchcock Iron Company, said stockholders agreed in substance (1) that the board of directors should fix on or before April 1, of each year, the annual tonnage of iron ore to be produced; (2) that each stockholder should be entitled to take a full quota of each grade of iron ore to be produced annually in proportion to the amount of stock owned by him; (3) that the price of said ore should be fixed each year by the board of directors at or about the cost of producing, including all costs, transportation, delivery, etc., to the lower lake ports.

On March 11, 1916, all of the stockholders of said Andrews & Hitchcock Iron Company, including petitioner, and her mother, Louisa Andrews, entered into a certain written contract with the Youngstown Sheet & Tube Company, an Ohio corporation, to transfer to said corporation all of the shares of capital stock held by them in said Andrews & Hitchcock Iron Company. The contract of March 11, 1916 incorporated by reference the provisions of the contract of December 16, 1914, above mentioned. In consideration for said transfer, said Youngstown Sheet & Tube Company paid for the benefit of the stockholders of said Andrews & Hitchcock Iron Company $2,200,000 in cash on or before April 11, 1916, and further, by way of additional consideration for said transfer and as the balance of said purchase price covenanted and agreed to pay
75 to the Dollar Savings & Trust Company of Youngstown, Ohio, for the benefit of said stockholders of the Andrews & Hitchcock Iron Company each following year, on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) for each and every ton of 2,240 pounds of iron ore which it might be entitled to take from the Mahoning Ore & Steel Company, and actually delivered by said company. On March 22, 1917, petitioner received by bequest from her mother, Louisa Andrews, a 550/4000ths interest in any payments that might subsequently become due under the contract of March 11, 1916. This interest was valued for purposes of Federal estate taxes imposed on the estate of Louisa Andrews, at $277,164.50.

The value, on March 1, 1913, of the 250 shares of stock of the Andrews & Hitchcock Iron Company, owned by petitioner and sold by her by said contract of March 11, 1916, was greater than cost and was also greatly in excess of $173,089.80, which is the aggregate amount received by petitioner over the period down to and including the year 1920:

1916 (petitioner's share of $2,200,000 paid in cash under contract of March 11, 1916)	$137,500.00
1917	9,900.00
1918	11,250.00
1919	8,995.50
1920	5,444.30
Total	173,089.80

76 Petitioner, prior to and including the year 1920, has received the following sums under said contract, on account of the 550/4000ths interest in the future payments under said contract, acquired by her by bequest:

1919	$19,790.10
1920	11,977.49
Total	31,767.59

The total of the sums so received by petitioner since her mother's death was less than the value of the said 550/4000ths interest as fixed by the Commissioner of Internal Revenue for the purposes of the Federal estate tax upon the estate of Louisa Andrews, and less than the value of said interest at the date of acquisition by petitioner.

The petitioner, between March 1, 1913, and December 31, 1920, kept no books and made her returns for Federal income tax purposes for the years 1916 to 1920, inclusive, upon the basis of cash receipts and disbursements.

Petitioner determined that the consideration to be paid by the Youngstown Sheet & Tube Company under the contract of March 11, 1916 (hereinafter referred to as "the obligation of the Youngstown Company"), had no present fair market value. In her income tax returns, petitioner treated all receipts from said contract during the years in question as constituting first a nontaxable return of capital. Since the total receipts of petitioner in and prior to the year 1920 were much less than the capital which petitioner
77 was entitled to have returned she reported no part of said receipts as taxable income.

The Commissioner of Internal Revenue treated the obligation of the Youngstown Company as having a fair market value in 1916 and purported to determine that value at $1,942,111.46. He further determined that petitioner was not entitled to have her capital returned fully before realization of income, but that a certain portion of each payment received by petitioner from said Youngstown Company represented a return of capital and the remainder represented a realization of income. Accordingly, he determined that petitioner realized income from the payments during the years in question as follows:

1918	$7,588.52
1919	19,307.46
1920	11,685.44

These were the final determinations, and he proposed the additional taxes now in controversy against petitioner in consequence of such determinations.

Upon appeal to the United States Board of Tax Appeals the final administrative agency in the executive branch of the Government, said board affirmed the action of the Commissioner of Internal Revenue.

The sole question here is whether the action of the board was proper under the law and the evidence.

78 III. ASSIGNMENT OF ERRORS

In affirming the action of the Commissioner of Internal Revenue and in purporting to find and determine a fair market value for the obligation of the Youngstown Company, and in determining that a certain proportion, to wit, 32.554% of each payment received by petitioner represented a return of capital and the remainder, to wit, 67.446% represented taxable income, the United States Board of Tax Appeals committed the following errors, upon which petitioner relies as the basis of this proceeding.

ERRORS IN FAILING TO MAKE FINDINGS OF FACTS REQUESTED

(1) Said board erred in that it failed to find that the obligation of the Youngstown Company to make future payments under said contract of March 11, 1916, had no fair market value at the time said contract was made, though requested to so find and though the fact was material and fully established by evidence.

(2) Said board erred in that it failed to find that said obligation of the Youngstown Company was not substantially the equivalent of cash and/or was not readily convertible into cash in the year 1916, though requested to so find and though such facts were material and fully established by evidence.

(3) Said board erred in that it failed to find that in 1916
79 there was no price established by public sales or sales in the way of ordinary business, of contracts reasonably similar to the contract of March 11, 1916, by which the fair market value of the obligation of the Youngstown Company at the time and place indicated could be determined; that, in 1916, there was no general market for obligations of the character here involved, and no established or current price for such obligations. The board was requested to so find and failed to do so, though such facts were material and fully established by evidence.

(4) Said board erred in that it failed to find that, in 1916, the vendors under the contract of March 11, 1916, on any sale or transfer of their interests thereunder could not have realized in cash or its equivalent, the real value or substantially the real value of said interests though, requested to so find and though such facts were material and fully established by evidence.

(5) Said board erred in that it failed to find that on March 11, 1916, approximately 240 acres, out of the 1,000 acres, of mineral land, leased by the Mahoning Ore & Steel Company were being actively operated, though requested to so find and though such fact was material and fully established by evidence.

(6) Said board erred in that it failed to find that the annual production from the properties leased by the Mahoning Ore & Steel Company would necessarily vary from year to year based upon con-

ditions in the steel business and upon the needs and require-
80 ments of the majority stockholders of said Mahoning Company for the ore produced by that company, though requested to so find and though such facts were material and fully established by evidence.

(7) Said board erred in that it failed to find that it was impossible in 1916 to determine with reasonable certainty the future annual production of the Mahoning Ore & Steel Company, though requested to so find and though such fact was material and fully established by evidence.

ERRORS IN FAILURE TO MAKE WRITTEN FINDINGS OF FACTS ON WHICH BOARD RELIED IN THE DETERMINATION OF DEFICIENCIES

(8) Said board erred in that it failed to make and to include in its written findings of fact a specific finding on whether or not the obligation of the Youngstown Company under the contract of March 11, 1916, had a fair market value at that date, such finding being necessary to a decision of the question before said board, and said board being required by law to make such specific written finding of fact.

(9) Said board erred in that it failed to make and to include in its written findings of fact a specific finding as to the alleged present market value in dollars at March 11, 1916, of said obligation of the Youngstown Company, such finding being necessary to a decision of the question before the board, and the board being required by law to make such specific written finding of fact.

81 (10) Said board erred in that it failed to make and to include in its written findings of fact a specific finding of the respective proportions of return of capital and taxable income held by it to be represented by each payment made to petitioner by the Youngstown Sheet & Tube Company under said contract of March 11, 1916, such finding being necessary to a decision of the question before said board, and said board being required by law to make such specific finding of fact.

(11) Said board erred in that it failed to make and to include in its written findings of fact a specific finding of the recoverable ore content of the lands leased by the Mahoning Ore & Steel Company and of the life of said deposits, upon which factors said board purported to predicate its value of the obligation of the Youngstown Company under the contract of March 11, 1916, though such factors were required to be determined under the method pursued by the board in purporting to determine the value of said obligation, and the board being required by law to make such specific written findings of fact.

ERRORS IN STATING FACTS AND EVIDENCE RELIED UPON BY THE BOARD IN ITS OPINION DECIDING THE CAUSE

(12) Said board erred in assuming and relying on the assumption that it could determine with reasonable accuracy the future

annual production of the Mahoning Ore & Steel Company, in
82 tons, when in fact such production was determinable only at will of the directors of that company.

(13) Said board erred in stating in its opinion and relying upon said statement in deciding the issue, that no evidence had been adduced before the board to prove the inaccuracy of the commissioner's estimate of 82,858,535 tons of ore as of March 1, 1916, the evidence clearly establishing the inaccuracy of said estimate.

(14) The said board erred in assuming and relying on the assumption that the commissioner's determination made in fixing the deficiencies in this case, that the life of the mine owned by the Mahoning Ore & Steel Company was 45 years from March 11, 1916, was correct, when the undisputed evidence shows that since fixing the deficiencies in this case the commissioner in a proceeding to fix the depletion rate of the Mahoning Ore & Steel Company found that the life of said mine was 40 years from March 1, 1913.

(15) Said board erred in stating in its opinion and relying thereon that "in 1916 it could be foreseen that each of petitioners would receive considerable amounts of money under the contract during the years immediately succeeding 1916," said statement not being supported by a finding of fact and being contrary to the evidence adduced before the board.

83 (16) Said board erred in stating in its opinion that the obligation of the Youngstown Company had a definite present fair market value, said statement not being supported by a finding of fact and being contrary to the evidence adduced before the board.

(17) Said board erred in stating in its opinion that there was no evidence before the board to show that the obligation of the Youngstown Company could not have been disposed of except at a substantial sacrifice, evidence having been adduced by petitioner clearly establishing that said obligations could not have been sold except at such a sacrifice.

(18) Said board erred in stating in its opinion (12 B. T. A. 601) that "What happened in 1916 was that certain stock was sold for $2,200,000 and a contract which the respondent determined had a fair market value at date of receipt of $1,842,111.46, which value we have approved for lack of evidence showing error on the part of the respondent in making such determination," said board having made no finding of the market value of said contract and the evidence before said board clearly establishing that no fair market value could be determined for the obligation of the Youngstown Company under said contract.

84 ERRORS IN ADMISSION OF EVIDENCE

(19) Said board erred in admitting in evidence any testimony and statements of facts tending to show the estimate of the ore content of lands leased by the Mahoning Ore & Steel Company and the average annual future production from said lands and the esti-

mated life of the mineral content of said lands from March 11, 1916, said evidence being incompetent, irrelevant and immaterial on the question of the present fair market value in 1916 of the obligation of the Youngstown Company under the contract of March 11, 1916, and said evidence having been duly objected to by the attorney for petitioner.

(20) Said board erred in admitting in evidence testimony and statements of facts that the present worth of the sum of $5,965,814.52, discounted at 6%, with provision for sinking fund at 4% over 45 years, was on March 11, 1916, $1,942,111.46, said evidence being irrelevant and immaterial, since the evidence shows that the estimate of $5,965,814.52 would not be received in equal annual installments over a period of 45 years, and said evidence having been duly objected to by the attorney for the petitioner.

(21) Said board erred in admitting in evidence testimony with respect to whether or not there was a possible market for iron ore mines in the Mesaba Range of Minnesota, said evidence being incompetent, irrelevant, and immaterial on the question of whether or not the obligation of the Youngstown Company had a
85 present fair market value in 1916, and said evidence having been dul yobjected to by the attorney for petitioner.

ERRORS IN CONCLUSION OF LAW

(22) Said board erred in holding that the opinions of expert witnesses and the other evidence before the board were insufficient to establish that the obligation of the Youngstown Company had no fair market value on March 11, 1916, said evidence being fully competent to establish that fact and said evidence being uncontradicted and fully establishing that fact.

(23) Said board erred in treating the payments made by the Youngstown Sheet & Tube Company under the contract of March 11, 1916, as royalties, when in fact, such payments constituted the purchase price of stock, and in determining the taxable income to petitioner under said contract by making allowance for depletion of the contract, it fully appearing from the evidence that such payments were not royalties and should not have been so treated.

(24) Said board erred in determining that of the payments received by petitioner as follows:

1918	$11,250.00
1919	28,785.60
1920	17,129.74

86 the following, or any part thereof, represented taxable net income:

1918	$7,588.52
1919	19,307.46
1920	11,685.44

(25) Said board erred in its method of determining the income of petitioner from the payments made by the Youngstown Company under said contract, in that said board failed to allow to petitioner a return of the cost or March 1, 1913, value, and other basis as provided by law before determining the taxable net income of petitioner, it appearing that said board simply treated said payments as payments of royalties.

(26) Said board should have held that petitioner was entitled under the sixteenth amendment to the Constitution and the revenue act of 1918 to recover the cost or other basis to her of the obligation of the Yongstown Company under the contract of March 11, 1916, before she should be deemed to have realized income from any payments to her pursuant to that obligation.

(27) Said board erred in holding that the contract of March 11, 1916, represented a closed transaction in that year, from which petitioner realized taxable income in that and subsequent years.

(28) Said board erred in that it treated the contract of
87 March 11, 1916, as a gain or loss transaction in that year, as above mentioned, and at the same time it refused to allow plaintiff to recover the value of property determined by the board to have been received by her, before taxing petitioner further with respect to that property.

(29) Said board erred in that in determining the capital value of the obligation of the Youngstown Company, under the contract of March 11, 1916, it had assigned different capital values to the right to receive payments on these ores, varying according to the time when the ores would be mined, but that the board abandoned these values and adopted a uniform value for each payment when it came to determine the amount which should be considered a return of capital on each payment as and when the payments were made.

(30) Said board erred in concluding, in view of the fact that petitioner was properly reporting income on the cash receipts and disbursements basis, that a non-negotiable agreement of the kind here involved for the contingent future payment of cash, gave rise to taxable income or constituted a taxable closed transaction prior to the time income was received by petitioner in cash.

(31) Said board erred in failing and refusing to give effect to the finding that petitioner reported its income on the cash receipts
88 and disbursements basis and in this proceeding confused said petitioner with the petitioners who make returns of income upon the accrual basis of accounting.

Wherefore your petitioner prays that this court may review the determination of the United States Board of Tax Appeals in this cause and reverse the decision of said board because of the errors aforesaid, and direct said board to redetermine the deficiencies against your petitioner on the basis that the obligation of the Youngstown Sheet & Tube Company under the contract of March

11, 1916, had no fair market value on that date; and/or that this court may direct and grant such other and further relief as to it may appear proper in the premises.

MILLARD F. TOMPKINS,
Attorney for Petitioner,
30 Broad Street, New York City.

STATE OF NEW YORK,
County of New York, ss.:
Duly sworn to by Millard F. Tompkins. Jurat omitted in printing.

89 Now, October 3, 1929, the foregoing petition for review certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

90 Before United States Board of Tax Appeals

Docket No. 5508

EDITH ANDREWS LOGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Statement of evidence

Filed Sept. 30, 1929

The above cause came on for hearing before the Honorable Charles P. Smith, member of the United States Board of Tax Appeals, upon the 17th day of January, 1928, there being present petitioners by their counsel, Mr. Tompkins, Mr. Ford, and Mr. Anderson, and respondent by his attorney, Mr. Mitchell.

The above cause at said hearing was consolidated for purposes of hearing and decision with the following cases then pending before the Board of Tax Appeals:

Henry W. Heedy	Docket No.	5916
William J. Hitchcock	" "	5917
Frank Hitchcock	" "	5918
William M. Andrews	" "	6014
Carrie L. Shaw, executrix	" "	6436, 6437, 6438
Julia Andrews Bruce	" "	18202

Thereupon, there was filed with the board the following agreed statement of facts. By agreement of the parties, the same was received in evidence and made a part of this record.

91 AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between counsel for the taxpayer appellant and the Commissioner of Internal Revenue in

the above-entitled case that for the purpose of the hearing of said case the following facts shall be taken as true without the necessity of introducing evidence, subject, however, to the right of either party to raise the question of the materiality of any facts so stipulated.

1. Prior to March 1, 1913, and continuously to March 11, 1916, the taxpayer appellant owned 250 shares, and her mother, Louisa Andrews, owned 1,180 shares, of the capital stock of the Andrews & Hitchcock Iron Company, an Ohio corporation, which at all said times mentioned, had 4,000 shares of capital stock issued and outstanding.

2. The Andrews & Hitchcock Iron Company at all times between the first day of March, 1913, and the 11th day of March, 1916, owned, among other assets, a 12% interest in the capital stock of the Mahoning Ore & Steel Company which controlled, under a lease dated April 1, 1895, and running for 97 years after said date, an iron mine located on the Mesaba Range in Minnesota, known as the Mahoning mine.

3. On the 11th day of March, 1916, all the stockholders of the Andrews & Hitchcock Iron Company, including the taxpayer
92 appellant and her mother, Louisa Andrews, entered into a certain written contract with the Youngstown Sheet & Tube Company, an Ohio corporation, providing for the sale of their stock in the Andrews & Hitchcock Iron Company to the Youngstown Sheet & Tube Company, a true copy of which contract is hereto attached marked "Exhibit 1" and hereby made a part of this stipulation as if specifically written herein, together with a true copy of a certain written contract dated December 16, 1914, by and between the stockholders of the Mahoning Ore & Steel Company, which contract of December 16, 1914, was by reference made a part of said written contract of March 11, 1916.

4. On March 22nd, 1917, Louisa Andrews, the taxpayer's mother, died, leaving a last will and testament, which was duly admitted to probate and under which the taxpayer received by bequest a 550/4000ths interest in any payment that might subsequently become due under the said contract Exhibit 1.

5. The value of the said 550/4000ths interest so acquired by the taxpayer under her mother's will was fixed by the Commissioner of Internal Revenue for the purposes of Federal estate tax imposed upon the Estate of Louisa Andrews, at $277,164.50.

6. The value on March 1, 1913, of the 250 shares of stock of
93 the Andrews & Hitchcock Iron Company owned by the taxpayer and sold by her under said contract Exhibit 1, was in excess of the sum of $173,089.80, and exceeded the cost of said shares to her.

7. Since the sale of said 250 shares under the contract Exhibit 1 the taxpayer has received the following sums on account of the purchase price of said stock down to and including the year 1920:

1916 (taxpayer's share of $2,200,000.00 paid in cash under said contract, Exhibit 1)	$137,500.00
1917	9,900.00
1918	11,250.00
1919	8,995.50
1920	5,444.30

8. The total of the sums received by the taxpayer as a result of the sale of said 250 shares of stock owned by her under the contract Exhibit 1, down to and including the year 1920, was less than the value on March 1, 1913, of the 250 shares of stock sold.

9. Since the death of her mother, Louisa Andrews, on March 22, 1917, the taxpayer, down to and including the year 1920, has received the following sums under said contract Exhibit 1, on
94 account of the 550/4000ths interest in the future payments under said contract, acquired by her under her mother's will:

1919	$19,790.10
1920	$11,977.49

10. The total of the sums so received by the taxpayer since her mother's death, by virtue of the 550/4000ths interest in the future payments under said contract Exhibit 1, acquired by the taxpayer under her mother's will, was less than the value of the said 550/4000ths interest fixed by the Commissioner of Internal Revenue for the purposes of the Federal estate tax upon the estate of Louisa Andrews, and less than the value of said interest at the date it was acquired by inheritance from her mother.

11. The taxpayer, between March 1, 1913, and December 31, 1920, kept no books, and her returns for Federal income tax purposes for the years 1916 and 1920, inclusive, were made upon the basis of cash receipts and disbursements.

12. A difference of opinion existed between engineers and experts employed by the Mahoning Ore & Steel Company on the one hand, and by the Commissioner of Internal Revenue on the other, both qualified by education and training in the iron mining indus-
95 try, as to the estimated annual production of said mine and its life as of March 11, 1916.

13. Engineers employed by the commissioner, qualified by education and training in the iron-mining industry to give such opinions, estimated that at the date of the contract of March 11, 1916 (Exhibit 1 attached hereto) that the ore reserves of the Mahoning Ore & Steel Company were 82,858,535 tons; that the average annual future production from said mine would be 1,841,300 tons; and that the life of the mine was 45 years from March 11, 1916.

14. The estimates mentioned above and adopted by the commissioner in this case, was based upon data obtained from the Mahoning Ore & Steel Company and the estimate furnished by that company's engineers, given in a proceeding to fix the depletion rate for the Mahoning Ore & Steel Company. It was based upon the content of recoverable ore in only approximately 620 acres out of the entire property leased by the company.

15. Since fixing the deficiency in this case, the Commissioner of Internal Revenue in a proceeding in which the depletion rate for the Mahoning Ore & Steel Company was changed, based upon data furnished by the company and the opinions of duly qualified engineers and experts employed by him, found that the life of said mine was forty years from March 1, 1913, and that the estimated
96 ore reserves of said mine on March 1, 1913, was 88,561,533 tons. The tonnage mined from said Mahoning mine from the 1st day of March, 1913, to the 11th day of March, 1916, was 5,039,655 tons.

16. The actual ore mined annually in tons for the Mahoning Ore & Steel Company between 1913 and 1926, inclusive, was as follows:

1913	1,515,428	1920	1,720,537
1914	1,212,287	1921	303,020
1915	2,311,940	1922	1,011,204
1916	2,215,788	1923	3,029,865
1917	2,525,144	1924	1,717,092
1918	2,019,481	1925	1,699,133
1919	1,217,167	1926	1,813,811

17. Assuming that the said Mahoning mine had ore reserves on March 11, 1916, of 82,858,535 tons, and further assuming that all said ore was mined, and 12% thereof, namely 9,942,664.2 tons was delivered to Youngstown Sheet & Tube Company, the total amount which would be received under the provisions of the contract of March 11, 1916, Exhibit 1, by all the vendors of said stock
97 and their successors in interest would be the sum of $5,965,814.52 at the rate of 60¢ per ton.

18. The present worth of the sum of $5,965,814.52 based upon the assumption that the amount was to be received in equal annual installments during 45 years, discounted at 6%, with provision for a sinking fund at 4%, was on March 11, 1916, $1,942,111.46.

(Signatures.)

WASHINGTON, D. C., *January 17, 1928.*

Exhibit 1 to agreed statement of facts

This agreement made and entered into at Youngstown, Ohio, this 11th day of March, A. D. 1916, by and between Louisa Andrews, Julia Andrews Bruce, Edith Andrews Logan, W. J. Hitchcock, Frank Hitchcock, H. W. Heedy, and the estate of U. A. Andrews, parties of the first part, hereinafter called the "stockholders," and the Youngstown Sheet & Tube Company (an Ohio corporation), party of the second part, hereinafter called "The Youngstown Company":

Witnesseth:

That whereas said stockholders are the owners of all the capital stock of the Andrews & Hitchcock Iron Company, (an Ohio
98 corporation), and the Youngstown Company is desirous of purchasing all of said stock for the benefit of itself and others, as hereinafter designated, upon the terms and conditions following:

Now, therefore, it is agreed by and between said parties as follows, to wit:

First. The stockholders, for themselves and their respective heirs, representatives, and assigns, agree with the Youngstown Company, for itself, its successors and assigns, that they will sell, assign, transfer, and set over to the Youngstown Company, and the others hereinafter designated, all of said capital stock of said the Andrews & Hitchcock Iron Company; and the Youngstown Company agrees that it will purchase said stock for itself and said others, hereinafter designated, and pay therefor to the Dollar Savings & Trust Company, of Youngstown, Ohio, for the benefit of said stockholders, the sum of one thousand dollars ($1,000.00) cash in hand upon the execution and delivery of this agreement, receipt whereof is hereby acknowledged; the further sum of two million one hundred ninety-nine thousand dollars ($2,199,000.00) on the 11th day of April, A. D. 1916, and the further sum in amount and manner to be determined as provided in paragraph 4 hereof.

Second. Said stockholders further agree that forthwith upon the execution and delivery of this contract they will deliver or
99 cause to be delivered to said the Dollar Savings & Trust Company all of said capital stock, properly assigned, and that they will cause said the Dollar Savings & Trust Company to deliver the same to said the Youngstown Company and others upon the payment of said sum of two million one hundred ninety-nine thousand dollars ($2,199,000.00) to said the Dollar Savings & Trust Company on said 11th day of April, as above provided, it being the intention of the parties that the title to said stock shall pass to and vest in the Youngstown Company, and said others, upon the making of said payment on April 11th, 1916, and that delivery of said stock and the making of said payment shall be simultaneous.

Third. It is understood that the capital stock of said the Andrews & Hitchcock Iron Company is four hundred thousand dollars ($400,000.00), divided into four thousand (4,000) shares of the par value of one hundred dollars ($100.00) each, and that the same is owned by said stockholders in the following several proportions.

Louisa Andrews	1,180 shares.
Julia Andrews Bruce	350 "
Edith Andrews Logan	250 "
W. J. Hitchcock	1,000 "
Frank Hitchcock	1,000 "
H. W. Heedy	100 "
Estate of U. A. Andrews	120 "

It is further agreed that said The Dollar Savings & Trust
100 Company shall deliver said stock to said the Youngstown Company and others as follows:

To the Youngstown Company	3,993 shares.
To James A. Campbell	One share.
To Richard Garlick	One "
To C. S. Robinson	One "
To William E. Manning	One "
To L. J. Campbell	One "
To C. D. Hine	One "
To E. L. Ford	One "

Fourth. It is understood that said the Andrews & Hitchcock Iron Company is the owner of twelve per cent or three hundred sixty (360) shares of the capital stock of the Mahoning Ore & Steel Company, a corporation of the State of Pennsylvania, having a capital stock of three hundred thousand dollars ($300,000.00) divided into three thousand (3,000) shares of the par value of one hundred ($100) each, which said Ore & Steel Company is the owner of certain valuable mines for the production of iron ore, and that the said the Andrews & Hitchcock Iron Company, by an agreement in writing in quintuplicate bearing date of December 16th, 1914, is entitled to take each year a full quota of each grade of ore to be produced by said Ore & Steel Company in proportion to the amount of stock owned by or represented for it, as provided for in said agreement, a copy of which is hereto attached and marked "Exhibit A" for the purpose of making the same a part thereof; and for the purpose of fixing the balance of the purchase price to be paid by the
101 Youngstown Company, it is therefore further agreed between said parties as follows, to wit:

That the Youngstown Company shall, and will each year hereafter, take or cause to be taken the full quota of or to which the said the Andrews & Hitchcock Iron Company, its successors or assigns, may be entitled, under and by virtue of the terms of said written agreement of December 16th, 1914, and shall give the notice provided for in said agreement, and will pay or cause to be paid to said the Dollar Savings & Trust Company for the benefit of said stockholders, and as the balance of said purchase price each year on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) per ton for each and every ton of twenty-two hundred forty (2240) pounds of iron ore so entitled to be taken for such year, and actually delivered by said Ore and Steel Company, it being understood that if any part of the quota for one year be left at the mine by election of the Youngstown Company, the Youngstown Company shall pay on account thereof to the stockholders in the same manner as though the same had been shipped from the mine, but shall not thereafter be required to pay any additional sum on account thereof.

Fifth. In order to secure the making of said deferred payment of said purchase price, as provided for in paragraph fourth, it is further agreed between the parties that said three hundred
102 and sixty (360) shares of Ore & Steel Company stock shall be properly assigned and deposited in the hands of said the Dollar Savings & Trust Company as collateral security therefor, and shall be held until all of the balance of said purchase price is fully determined and paid. If at any time the Youngstown Company fails to pay punctually any instalment of said purchase price as it falls due, and such default continues for the period of thirty

days after written notice and demand therefor made by the stockholders, or any of them, then any of said stockholders, in addition to any other lawful remedy, may elect to take and keep as and for his own, his proportionate share of said Ore and Steel Company stock to which his pro rata holdings of the stock of said the Andrews & Hitchcock Iron Company, as herein set forth, may entitle him, and shall have the further additional right to recover any and all costs, expenses, damages and attorney fees suffered or incurred by him in the premises.

It is further understood and agreed that the Youngstown Company will pay all costs, charges, and expenses, including attorney fees and compensation of the Dollar Savings & Trust Company connected with the making of this contract, and the full and complete performance of the trust herein provided for, it being the intention of the parties that said stockholders shall receive said sum of sixty cents per ton for ore and all other sums herein made payable to them, free and clear from any costs or expense whatsoever incident to the making or carrying out of this agreement.

103 Sixth. All payments made by the Youngstown Company to said the Dollar Savings & Trust Company shall be by it forthwith distributed and paid over to the stockholders in shares proportionate to their stockholdings in said the Andrews & Hitchcock Iron Company, as above set forth in paragraph third hereof.

Seventh. The rights and liabilities of the parties hereto shall extend to and be binding upon their respective heirs, or successors, administrators, executors, and assigns.

In witness whereof the parties have signed or caused their names to be signed to triplicate hereof the day and year first above written.

(Signatures.)

Exhibit A to agreement

AGREEMENT

(Executed in quintuplicate)

(Being Exhibit A referred to in the foregoing Exhibit 1)

Made this 16th day of December, 1914, by and between the present stockholders of the Mahoning Ore & Steel Company, said company having a capital stock of $300,000.00, divided into three thousand (3,000) shares each of $100.00 par, issued and held as follows:

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Name	Shares	Percentage
John A Topping, trustee (representing Republic Iron & Steel Co.)	180	6%
Frank Hitchcock, trustee (representing the Andrews & Hitchcock Iron Co.)	360	12%
Leonard C. Hann	65	
D. R. Hanna	63	
A. M. Robbins	33	
Simon Perkins	65	
C. C. Bolton	43	
Samuel W. Folsom	10	
L. C. Hanna and D. R. Hanna	80	
M. Andrews (represented by L. C. Hanna and C. C. Bolton, trustees)	1	12%
D. G. Kerr (representing Carnegie Steel Company)	1	
Carnegie Steel Company	899	30%
W. H. Donner	1,496	
Effingham B. Morris	1	
Herbert F. Black (representing Cambria Steel Company)	1	50%
	3,000	100%

Whereas by agreement bearing date 26th of April, 1897, between representatives of the National Tube Company, Andrews & Hitchcock Iron Company, Mahoning Valley Iron Company, Andrews Brothers Company, and Cambria Iron Company, it was agreed that the capital stock of the Mahoning Ore Company was held for the use of the said five manufacturers and consumers of ore as follows:

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National Tube Works Company	20%
Andrews & Hitchcock Iron Co	12%
Mahoning Valley Iron Company	6%
Andrews Brothers Company	12%
Cambria Iron Company	50%

And it was provided that each of said manufacturers and consumers should be entitled to take its proportional part of the total output of ore mined per annum from the mines of said company at the cost of production and delivery as therein fixed and determined;

And whereas the Mahoning Ore & Steel Company was organized in pursuance of the provisions of said agreement and took over all leaseholds, property, and assets of the Mahoning Ore Company;

And whereas since the date of said agreement, there have been transfers of said capital stock of the Mahoning Ore & Steel Company and changes in the ownership thereof by and with the approval of all the parties in interest, and it is desirable to restate the respective interests as they now stand and more clearly provide, for disposal of the ore produced from the mine of the said Mahoning Ore & Steel Company;

Now, therefore, this agreement witnesseth that the entire capital stock of Mahoning Ore & Steel Company being now held as hereinbefore stated, each of the parties in interest hereby agrees that

106 the base agreement bearing date of April 26th, 1897, be, and hereby is, terminated, and that in lieu thereof the following terms and conditions shall hereafter govern the method whereby the iron ore produced from mines of said Company shall be disposed of.

First. The tonnage of each grade to be produced annually shall be fixed by the board of directors on or before April 1st, in each year, and notice of the fixing of said tonnage shall be mailed promptly to each stockholder.

Second. Each of the interests, as hereinbefore set forth, shall be entitled to take a full quota of each grade to be produced, in proportion to the amount of stock owned by or represented for them, and within 15 days after receipt of notice referred to in preceding paragraph, shall notify in writing the president of said Mahoning Ore & Steel Company whether or not it elects to take the full quota to which it is entitled. Undesired tonnage, if any, shall be offered pro-rata to the other stockholders, and such portion thereof not desired by them can be disposed of by the board of directors by reducing the originally fixed production to the extent of the unaccepted tonnage, or in any other manner the board of directors may agree upon.

Third. The price of ores shall be fixed each year by the board of directors and shall be at or about the cost of production, including all costs, transportation, delivery, handling, etc., to the lower lake ports. Delivery elsewhere with corresponding modification in
107 price, may be arranged in special instances, subject to the approval by the board of directors.

Fourth. Formal contracts shall be entered into annually with the company covering the tonnage and grade of ore which each interest or representative shall have elected to take, in accordance with the provisions of this agreement, and as estimated cost price will be named in said contract, based on preceding section, subject to adjustment to actual cost at end of ore season.

In witness whereof this agreement has been executed by the parties hereto, the day and year above written.

L. CL. HANNA,
C. C. BOLTON,
As Trustees.
D. C. KERR,
(For Carnegie Steel Company).
THE ANDREWS & HITCHCOCK COMPANY,
By FRANK HITCHCOCK, *Pt.*
W. H. DONNER,
E. B. MORRIS,
HERBERT F. BLACK,
Representing Cambria Steel Co.
JNO. A. TOPPING,
Trustee, Republic Iron & Steel Co.

108 There was then offered and received in evidence, as petitioner's Exhibit No. 1, a copy of the contract of sale between the stockholders of the Andrews & Hitchcock Iron Company, on the one part, and the Youngstown Sheet & Tube Company, on the second part, dated March 11, 1916, and which forms part of the agreed statement of facts as Exhibit 1 thereto and which is fully above set forth.

Thereupon, under the reservation to either party of the right to raise a question as to the materiality of any facts agreed upon, as set out in the agreed statement of facts, hereinabove set forth, attorneys for petitioner entered objections to the 13th, 14th, 15th, and 18th paragraphs of said agreed statement of facts, as follows:

Objections to stipulation

"Mr. Tompkins: On behalf of Edith Andrews Logan, under the rights of objection raised to the stipulation, I object to the 13th paragraph of the stipulation, upon the ground that it is incompetent, irrelevant, and immaterial, and has no bearing on this proceeding; that the test here is not as to the value of the Mahoning mine, but as to whether the obligation of the Youngstown Sheet & Tube Company under the contract of March 11, 1916, to make future payments, could be sold, whether a purchaser could be found so as to make it a closed transaction or not, and that, as matter of law, it would be error to value the contract and treat it as a closed transaction based upon the estimates made by the engineers merely as
109 to the life of the mine. The test here is whether the obligation of the Youngstown Sheet & Tube Company to pay 60¢ per ton for the ore under this contract could be sold and disposed of, whether there was any purchaser that could be found in the market in 1916 that would be ready and willing to pay cash or the equivalent of cash for that obligation. It is to preserve our legal rights that I make that objection.

* * * * * * *

"The MEMBER. As I understand it, there is no objection raised to the actual fact.

"Mr. TOMPKINS. Yes, sir; that is right.

"Mr. FORD. That is right.

"Mr. TOMPKINS. No; there is no question about that.

"The MEMBER. The record will simply show your objection to it. I do not see that it is necessary for me to rule upon it at the present time.

"Mr. TOMPKINS. If you rule later adversely to us, of course, you will save us an exception?

"The MEMBER. Yes; that is correct.

* * * * * * *

"Mr. MITCHELL. And the commissioner, in the event the objection is sustained, would also desire an exception.

"The MEMBER. That will be noted.

* * * * * * *

"Mr. TOMPKINS. May a similar objection be noted to this 14th paragraph? I suppose your honor will make a similar ruling.
110 "The MEMBER. Yes; that is correct.

"Mr. FORD (after reading paragraph 15 of the agreed statement of facts). A similar situation here arises, does it not?

"Mr. TOMPKINS. Yes.

"The MEMBER. A similar ruling.

* * * * * * *

"Mr. TOMPKINS. On behalf of the taxpayers, we object to paragraph 18 of the proposed stipulation, upon the ground that it is irrelevant and immaterial and has no bearing on the case, and that the contract of March 11, in evidence here, and the record as to actual tonnage show that this sum of $5,965,814.52 would not be received in equal annual installments over a period of 45 years.

"The MEMBER. I make the same ruling in this instance that I did in the other.

"Mr. TOMPKINS. The same ruling with reference to taking an exception?

"The MEMBER. Yes."

* * * * * * *

Said member later overruled said objections to the 13th, 14th, 15th, and 18th paragraphs of the agreed statement of facts, hereinabove fully set out, and duly noted exceptions on behalf of petitioner to said rulings.

Thereupon there was offered and received in evidence, as petitioner's Exhibit No. 2, a statement by the Commissioner of Internal Revenue attached to his notice of deficiency and identified by the symbols, IT:PA:1-VMW-104-60D, the material portions of which are as follows:

111 *Petitioner's Exhibit 2*

In re: Mrs. Edith Andrews Logan, 814 Stambaugh Building, Youngstown, Ohio

	Deficiency in tax	Overassessment
1915 (claim filed)		$18.60
1916 " "		1,441.15
1917 " "		491.73
1918 (waiver filed)	$994.05	
1919 " "	14,277.92	
1920 " "	6,776.66	
Total	22,048.63	1,951.48

Your income tax liability has been adjusted in accordance with the recommendation of the former Committee on Appeals and Review as follows:

* * * * * * *

1916

* * * * * * *

From a reconsideration and audit of the information and data on file, it is disclosed that no profit was realized in 1916 from the sale of the Andrews and Hitchcock Iron Company stock to the Youngstown

Sheet and Tube Company and, accordingly, the profit as computed by the revenue agent who verified your return has been excluded therefrom. A portion of the receipts from the ore shipments in subsequent years, however, is taxable, the basis of which is set forth in the statement showing the tax adjustment for your 1917, and subsequent years, returns.

* * * * * * *

112 1917

* * * * * * *

Add to net income reported on original return:

Ore payments of $9,900.00 received, less return of capital of $3,222.45 $6,677.55

You are advised that your taxable income from ore payments has been determined in accordance with the recommendation of the Committee on Appeals and Review. The following depletion schedule has been computed in accordance therewith:

Depletion schedule

Year	Receipts from ore	Tons paid for	Sustained	Depletion allowed	Claimed by omission
1917	$9,900.00	16,500	$3,222.45	$3,222.45	$9,900.00
1918	11,250.00	18,750	3,661.48	3,661.48	11,250.00
1919	28,785.60	47,976	9,478.14	9,478.14	28,785.60
1920	17,421.79	29,036	5,736.35	5,736.35	17,421.79

* * * * * * *

1918

* * * * * * *

Add to net income reported on original return:

Ore payments received from Youngstown Sheet and Tube Company, $11,250.00 less return of capital thereon of $3,661.48 $7,588.52

* * * * * * *

113 The ore receipts from the Youngstown Sheet and Tube Company less the return of capital thereon have been included as income as shown herein under the statement showing the income and tax adjustment for 1917.

* * * * * * *

1919

* * * * * * *

Add to net income reported on original return:

Ore receipts of $28,785.60 received from Youngstown Sheet and Tube Company, less return of capital thereon of $9,478.14 $19,307.46

* * * * * * *

The inclusion of the receipts of $28,785.60 in gross income representing your share of the ore payments by the Youngstown Sheet and Tube Company with a deduction therefrom of $9,478.14, representing a return of capital, is based on the schedule in the statement following your tax adjustment for 1917.

* * * * * * *

1920

* * * * * * *

Add to net income reported on original return:

Ore receipts from the Youngstown Sheet and Tube Company of $17,421.79 less return of capital thereon of $5,736.35---------- $11,685.44

* * * * * * *

114 The inclusion in gross income of the receipts from the Youngstown Sheet and Tube Company representing your share of the ore shipments with a deduction of $5,736.35, representing a return of capital, is based on the explanation of this transaction in the statement following the adjustment of your net income and tax liability for 1917.

* * * * * * *

Thereupon, there was offered and received in evidence as petitioner's Exhibit No. 3, the recommendation of the Committee on Appeals and Review of the Bureau of Internal Revenue dated February 4, 1924, as follows:

Petitioner's Exhibit 3.

RECOMMENDATION NO. —

Committee on Appeals and Review

In re: Appeal of Mrs. Julia Andrews Bruce, North Street, Greenwich, Connecticut

Years 1917, 1918, 1919, and 1920

FEBRUARY 4, 1924.

Mr. COMMISSIONER

(For deputy commissioner, head Income Tax Unit):

The committee has carefully considered the appeal of Julia Andrews Bruce, Greenwich, Connecticut, from the action of
115 the Income Tax Unit in proposing to assess additional taxes for the years 1917 to 1920, inclusive, predicated in part upon adjustments of net income hereinafter outlined.

Oral hearing was accorded the representative of appellant on January 16, 1924.

Appellant was the owner of 350 shares of a total of 4,000 shares of the capital stock of the Andrews and Hitchcock Iron Company.

The latter company owned 360 shares, or 12%, of the entire outstanding capital stock of the Mahoning Ore and Steel Company.

Under an agreement bearing date of December 16, 1914, between the Mahoning Ore and Steel Company and its stockholders, the latter were entitled to take, at or about the cost of production, including all costs, transportation, delivery, handling, etc., to lower lake ports, a full quota of each grade of ore produced by the company in proportion to the amount of stock owned by or represented for them.

On March 11, 1916, the stockholders of the Andrews and Hitchcock Iron Company contracted to sell to the Youngstown Sheet and Tube Company all of their holdings in the former company for $2,200,000 cash, of which amount there was paid upon execution and delivery of the agreement $1,000, and $2,199,000 on April 11, 1916, and a further consideration set out in the contract as follows:

116 "That the Youngstown Company shall, and will each year hereafter, take or cause to be taken the full quota of ore to which the said the Andrews and Hitchcock Iron Company, its successors or assigns, may be entitled, under and by virtue of the terms of said written agreement of December 16th, 1914, and shall give the notice provided for in said agreement, and will pay or cause to be paid to the said the Dollar Savings & Trust Company for the benefit of said stockholders, and as the balance of said purchase price, each year on or before thirty days after the close of navigation to the transportation of ore on the Great Lakes, the sum of sixty cents (60¢) per ton for each and every ton of twenty-two hundred forty (2240) pounds of iron ore so entitled to be taken for such year and actually delivered by said ore and steel company, it being understood that if any part of the quota for any year be left at the mine by election of the Youngstown Company, the Youngstown Company shall pay on account thereof to the stockholders in the same manner as though the same had been shipped from the mine, but shall not thereafter be required to pay any additional sum on account thereof."

The contract sets forth that it is "the intention of the parties that the title to said stock shall pass to and vest in the
117 Youngstown Company, and others, upon the making of said payment on April 11, 1916, and that delivery of said stock and the making of said payment shall be simultaneous." The contract further provides that the 360 shares of stock of the Mahoning Ore & Steel Company owned by the Andrews and Hitchcock Iron Company were to be properly assigned and deposited in the hands of the Dollar Savings and Trust Company as collateral security "until all of the balance of said purchase price is fully determined and paid," and that in the event of default in the payment of any installment continues for a period of 30 days after written notice and demand therefor by the vendors, or any of them, then any of

said vendors "in addition to any other lawful remedy, may elect to take and keep as and for his own his proportionate share of said ore and steel company stock to which his pro rata holdings of stock of said the Andrews & Hitchcock Iron Company may entitle him."

Upon the death of her mother, which occurred on March 22, 1917, appellant inherited a one-half interest in her mother's estate, including a 550/4000 interest in the contract of March 11, 1916. The value of this interest, for the purpose of the Federal estate tax, has been appraised at $277,164.50.

As deferred payments on the purchase price of her holdings in the Andrews and Hitchcock Iron Company, there was paid to appellant under the terms of the contract heretofore quoted, the following amounts:

118

1917	$13,860.00
1918	15,750.00
1919	32,383.80
1920	19,509.53

The appellant reported none of the above receipts as income on her tax returns, but rather treated them as a return of capital on the theory that she was entitled to recover the March 1, 1913, value of the stock sold, and the fair market value at the date of acquisition of the 550/4000 interest in the contract of March 11, 1916, acquired by inheritance, before reporting any receipts as income for tax purposes.

The Income Tax Unit has determined the total ore reserves in the mines of the Mahoning Ore and Steel Company on April 1, 1916, to have been 82,858,535 tons, and the life of the mines as 45 years from that date. On the basis of an ownership of 12% of the capital stock of the Mahoning Ore and Steel Company, the unit reasons that the total tonnage of ore to be delivered to the Andrews and Hitchcock Iron Company will amount to 9,943,024.2 tons, which, at the rate of $0.60 per ton, will yield payments amounting in the aggregate to $5,965,814.52 to the former stockholders. The present worth at April 1, 1916, of such payments, assuming that the same will be paid in equal annual installments, discounted at 6% with provision for a sinking fund at an equivalent rate compounded annually, the unit finds to be $2,049,018.65. As the appellant received
119 a 350/4000 interest in the contract of March 11, 1916, as a part of the purchase price of her stock, the unit further finds that the present worth at April 1, 1916, of her expected receipts was $179,289.13. Therefore, the unit finds that this amount of $179,289.13 plus $192,500 cash (350/4000×$2,200,000) or $371,789.13, was the consideration appellant received in 1916 for her stock, and as this selling price was more than the cost of such stock and less than the March 1, 1913, value thereof, the unit further finds in accordance with Treasury Decision 3206 that appellant realized no gain or loss from the sale of this stock in 1916.

Out of every $0.60 received by appellant as deferred payments during the years under consideration on her 350/4000 interest in the contract of March 11, 1916, the unit has held that 20.6 cents constitutes a return of capital, while 39.4 cents constitutes taxable income. The unit has accepted the value of $277,164.50 for the 550/4000 interest acquired by inheritance, as appraised for the purpose of the Federal State tax, and has held that out of every $0.60 received by appellant as deferred payments during the years under consideration on this 550/4000 interest, 20.86 cents constitutes a return of capital while 39.14 cents constitutes taxable income.

The appellant contends that this sale of stock should be treated as a sale of personal property partly for cash and partly for a
120 deferred consideration, and since the obligations represented by the deferred payments have no readily realizable market value the amounts received would be applied to reduce the "basis" of the property sold and be taxable only if, when, and to the extent that they ultimately exceed the "basis."

In support of this contention, reference is made to article 46 of Regulations 62 and S. M. 1353 and O. D. 482 (2 C. B. 77). Should this contention be rejected, then the appellant presents as an alternative that property was exchanged for a contract "calling for a series of annual payments or, in other words, for an annuity contract, in which event the case would fall under article 47 of Regulations 62, which provides that the amounts received under an annuity contract in excess of the premium or price paid therefor is income for the year of its receipt."

It should be noted here that the Income Tax Unit and the appellant are in accord with respect to the cost of appellant of her 350 shares of capital stock of the Andrews and Hitchcock Iron Company sold in 1916, and the March 1, 1913 value thereof.

The issues presented to the committee for determination may therefore be briefly summarized as follows:

(1) Is the Income Tax Unit correct in holding that the sale of this stock was a completed transaction in 1916, notwithstanding
121 the fact that the transaction involved deferred payments extending over an estimated period of 45 years; and

(2) If the unit's action with respect to the first issue is correct, how are the deferred payments, as and when received, to be treated for income tax purposes.

Under the provisions of article 26, par. 171, Regulations 33, revised, it was mandatory upon appellant to render her return for the year 1916 on the basis of cash receipts and disbursements. Therefore, unless it can be shown that the obligations of the purchaser were equivalent to cash, the transaction could not be regarded as having been comp' ted in 1916 and the appellant would be entitled to treat the same as a sale of personal property on the installment plan, as outlined in article 42, Regulations 45 (1920 edition). See O. D. 715 (3 C. B., 107). On the other hand, if it can be demonstrated that

the obligations of the purchaser were equivalent to cash, then the proper rule to be followed under such circumstances would appear to be that set forth in article 1564 (a), Regulations 45 (1920 edition), as amended by Treasury Decision 3206, and the case would fall within that provision of article 42, Regulations 45 (1920 edition) as amended, which states that "occasionally a fourth type of sale is met with, in which the buyer makes an initial payment of such a substantial nature (for example a payment of more than 25%)
122 that the sale, though involving deferred payments, is not one on the installment plan."

It is with difficulty that a rule may be laid down as to when property may be said to have a fair market value. Each case must stand upon its own merits and be judged in the light of its own peculiar facts.

It implies the existence of a public of possible buyers at a fair price. The adjective "fair" emphasizes the idea of fairness inherent in this conception of market value and excludes any possibility of a construction of the words "market value" with reference to a market in which, or to circumstances of sale under which, for any reason, a fair price could not be obtained.

Having in mind the principle above enunciated and reviewing all of the facts peculiar to the instant case, the committee is clearly of the opinion that the 350/4000 interest in the contract of March 11, 1916, received by the appellant as a part consideration for her holdings in the Andrews and Hitchcock Iron Company had a determinable and assignable fair market value when received by her in 1916, and that such interest ought to be regarded as equivalent to cash. The contract of December 16, 1914, between the Mahoning Ore and Steel Company and its stockholders was iron-bound, and in the absence of any specific provision in the contract relating to the period of time covered by it, it is a reasonable presumption that it
123 applied to the total contents of the Steel Company's mines as and when produced. The contents of those mines can be and have been readily determined. Likewise was the contract of March 11, 1916, between the Youngstown Sheet and Tube Company and the former stockholders of the Andrews and Hitchcock Iron Company equally iron-bound, and assured to the latter deferred payments equivalent to $0.60 per ton on 12% of the total ore reserves of the Steel Company's mines. The deferred payments were secured by the 360 shares of the capital stock of the Steel Company owned by the Andrews and Hitchcock Iron Company which had been placed in the hands of a trustee for that purpose, and under the terms of the contract by virtue of which these shares were deposited with the trustee, the stockholders were assured that in the event of default in any of the deferred installments by the purchaser of the stock they would receive their pro-rata shares of the ore produced by the Steel Company, by exercising their option to take over the collateral security. There can be no doubt but what, under the circumstances,

the interest of each stockholder could be converted into cash without any material loss. The initial cash payment was in excess of 25% of the total selling price. The committee is, therefore, of the opinion that the sale by appellant in 1916 of 350 shares of the capital stock of the Andrews and Hitchcock Company for cash and deferred payments constituted a closed and completed transaction of that year.

124 The committee is of the opinion that the unit's computation of the present worth at April 1, 1916, of the appellant's 350/4000 interest in the contract of March 11, 1916, should be revised to the extent of providing a sinking fund at 4% rather than 6% as used by the unit. The result of this revision will show a present worth of $169,934.73 in lieu of $179,289.13 as computed by the unit.

The question of the manner of treating the deferred payments, as and when received, for income-tax purposes, presents no serious difficulties. It is obvious that if in computing gain or loss upon the transaction when completed in 1916, the appellant is given the benefit of a market value for her interest in the contract which is based upon the discounting of the gross deferred payments at the rate of 6%, then in reaching a conclusion as to how the deferred payments when received, shall be treated for income-tax purposes, the computation should merely be reversed and the deferred payments allocated to a return of capital in the same ratio as the total deferred payments bear to their discounted value and the balance of such deferred payments reported as income. Therefore, of every dollar received represented by the 350/4000 interest, $0.32554 represents a return of capital and $0.67446 constitutes taxable income. Of every dollar received represented by the 550/4000 interest acquired by inheritance, $0.33099 represents a return of capital and $0.66901 constitutes taxable income.

125 Accordingly, it is recommended that the action of the Income Tax Unit be modified as herein indicated, and that the appeal be denied.

(Signed),
Committee on Appeals and Review.

Approved:
(Signed) D. H. BLAIR,
Commissioner of Internal Revenue.

"Mr. FORD. I am not attempting to offer the closing letters in the other cases, because these are being offered for the purpose of showing the particular method of computation adopted in the department, and they are similar in so far as that is concerned.

* * * * * * *

"Mr. FORD. As I understand it, all of the stipulations are received?
"The MEMBER. Yes; that is correct."
Thereupon the following testimony was heard:

FRANK HITCHCOCK, having been duly sworn as a witness on behalf of petitioner, upon direct examination testified as follows:

"My name is Frank Hitchcock, and I live in Youngstown, Ohio. I was formerly a stockholder and officer of the Andrews & Hitchcock Iron Company and immediately before March 11, 1916, was
126 president of that company. I negotiated, on behalf of the stockholders of the Andrews & Hitchcock Iron Company, the contract of March 11, 1916, entered into between those stockholders and the Youngstown Sheet & Tube Company. Mr. Campbell negotiated the contract on behalf of the Youngstown Sheet & Tube Company. He was then president of the Youngstown Sheet & Tube Company. His father was there, and Richard Garlick, but it was Mr. Campbell who did the talking. There were some other directors with Mr. Campbell at the time. The Andrews & Hitchcock Iron Company owned 12 per cent of the stock of the Mahoning Ore & Steel Company.

"Q. Referring to this contract of March 11, 1916, and the provision that some $2,200,000 be paid in cash, I will ask you whether that consideration of $2,200,000 was in payment indirectly for certain of the assets of the Andrews and Hitchcock Iron Company?

"Mr. MITCHELL. Just a moment. I object to that as calling for a conclusion and as not the best evidence. The contract itself shows what the payments were for and what they were made for.

* * * * * * *

"The MEMBER. The objection is overruled. * * * An exception will be noted.

* * * * * * *

"A. They were."

127 "Those assets comprised some small properties in Michigan. Some of them have turned out to be pretty good since then, but at that time they were pretty poor, I thought. They also included blast furnaces in Ohio, coal lands in Pennsylvania, and moneys in the bank. At that time these represented practically all the assets they had, outside of the value of the Mahoning Ore & Steel Company stock. There was no discussion at all to the effect that the present cash payment represented the interest of the Andrews & Hitchcock Iron Company in the Mahoning Ore & Steel Company stock.

"'Q. Why did you not bring up any discussion as to a present cash payment for that interest?

* * * * * * *

"'A. Being a minority stockholder, I did not think it was—I mean the Andrews and Hitchcock Iron Company being a minority stockholder in the Mahoning Ore and Steel Company, I did not think there was any chance of getting a cash value for the property, and did not bring it up, as to its worth. I mean cash value as to its worth.

"'Q. Mr. Hitchcock, at that time, namely, March 11, 1916, did you know of any market where you could have obtained, or did you know of any market where could be sold an interest of 12 per cent of the stock of the Mahoning Ore & Steel Company?

"'A. No; not at its value.

* * * * * * * *

"'Q. Mr. Hitchcock, in 1916, was there any price established by public sale or sales in the way of ordinary business of similar
128 contracts to this contract of March 11, 1916, in which the fair market value of the contract at that time, at the time it was made, could be determined?

"'Mr. MITCHELL. Objected to as calling for a conclusion of the witness.

"'A. No.

"'MEMBER. Objection overruled * * *,' an exception noted.

"'Q. Was there in 1916 any general market for contracts of this character and any established or current market price?—A. No.

"'Mr. MITCHELL. The same objection.

"'MEMBER. The same ruling.

"'Mr. MITCHELL. Exception.'"

Upon cross-examination, Frank Hitchcock testified as follows:

"I was president of the Andrews & Hitchcock Iron Company in 1916, before I sold out, and had been president since about January, 1900. My position in the iron industry made me familiar with the larger transactions that went on in that industry.

"I don't remember the sale of the Chemung mine and I do not know where the Chemung mine is. I do not know anything about the sale of the Kosmerl mine and I do not know where that mine is. I do not know of the Eva mine or the Ruth mine and I don't know any of those names just at present.

129 "In 1916, and for a few years before that, I had my office at Youngstown, Ohio. My duties required me to go up on the Mesaba Iron Range. I was up there two or three times a year, maybe oftener. It would depend altogether on what was going on then. We got monthly reports all the time. I made short trips in going over the property and other properties. The name, Tener mine, is familiar, but I don't remember at the present time just what the transaction was involving that mine. I don't know the sale prices of any mine at or around 1916. I know there were mines sold there, but I don't know about 1916, just exactly right there. When mines were sold I did not inquire into the circumstances nor familiarize myself with the transaction except in a general way. I am not aware of the fact that the United States Steel Corporation was buying mines during or around that time. They were interested in iron mines—in the Mahoning mine.

"'Q. Did I understand you to say that you did not think there was an chance of getting the cash value of the Mahoning property?—A. Yes; I said that. There was no chance of getting the cash value, on account of the minority holdings.

"'Q. When you sold out, did you feel that you had not obtained the cash value?—A. When we sold out? We did not get through this contract—we expected to get the cash value.

"'Q. Do you mean by your answer that you did not think you could get the cash value; you did not think you could get a payment in cash, the entire payment in cash?—A. We did not get the entire payment in cash.

130 "'Q. You do not mean to say that you were not getting a fair value for your property, did you?—A. No.

"'Q. You meant that you were getting it over a considerable term of years?—A. Yes.'

"I think that the United States Steel Corporation has bought some iron-ore properties which, collectively, are as big as the Mahoning mine. I would say that that company and other large companies of the same sort sometimes did buy large ore properties. The United States Steel Company bought most of the properties, and they were put together. They bought the Oliver Mining Company, which is still in business.

"'Q. Well, I understood you to say that you did not know of any market where 12 per cent of the Mahoning Ore & Steel Company stock could be sold at its value.

* * * * * * *

"'A. Not for its cash value.

"'Q. Not for cash value; and you mean by that not for the full purchase price in cash?—A. In cash; yes.

"'Q. But you are not prepared to say that there was no market existing in which a reasonable value could be obtained, partly in cash and partly over a period of years; you are not prepared to say there was not that sort of a market, are you?—A. I did not know of any.'"

131 JOHN B. PUTNAM, having been first duly sworn as a witness on behalf of petitioner, upon direct examination testified as follows:

"My name is John B. Putnam, and I reside at Cleveland, Ohio. I am connected with Pickands, Mather & Company, in Cleveland. They are a steel company, a partnership. They operate iron and ore mines, and have coal, pig-iron, and vessel interests. They have approximately 35 iron-ore properties in their different companies. I am generally familiar to-day with iron-ore leases and contracts covering the taking of iron ore. I have looked over the contract marked "Petitioner's Exhibit No. 1," dated the 11th day of March, 1916, between certain stockholders of the Andrews and Hitchcock Iron Company and the Youngstown Sheet and Tube Company.

"Q. In 1916, was there any price established by public sales, or sales in the way of ordinary business of similar contracts, by which the fair market value of this contract of March 11, 1916, petitioner's Exhibit No. 1, at the time it was made, can be determined?

"Mr. MITCHELL. I object to all that as calling for a conclusion of the witness, whose qualification to answer has not yet been established.

"The MEMBER. The objection is overruled * * *; exception noted.

"A. I know of no such market for such contract.

132 "Q. Was there in 1916 any general market for contracts of that character or any established or current market price?

"Mr. MITCHELL. Same objection.

"The MEMBER. Overruled.

"Mr. MITCHELL. Exception.

"A. Not that I know of.

"Q. In your opinion, could the vendors, that is, the sellers, of this contract, petitioner's Exhibit No. 1, in 1916, on any sale of this contract, have readily realized in cash or its equivalent, its real value?

"Mr. MITCHELL. The same objection.

"The MEMBER. The objection is overruled—exception will be noted.

"A. I think not.

"Q. Why not. Give your reason.

"Mr. MITCHELL. The same objection.

"The MEMBER. The same ruling—an exception noted.

"A. The real value of that contract depends upon two things, in my judgment. It depends first upon the total amount of iron ore that will be taken out and taken by the Youngstown Sheet & Tube Company, and second upon the rate at which they will take that ore. All of the properties owned by the Mahoning Ore & Steel Company have not been explored, and the tonnage is not definitely ascertained, so that you would have a considerable amount of

133 uncertainty as to the total amount of tonnage which would be shipped under the contract, and which would measure the payment of 60 cents a ton.

"In addition to that, there is no minimum in the contract, and there is no control by the purchaser, or seller of that contract, over the amount that will be shipped each year.

"The amount of ore under this contract, and the stockholders' agreement to take the ore, which is referred to in there, is left to the control of the board of directors of the Mahoning Ore & Steel Company. They would determine each year how much ore would be taken from the property, and therefore how much these payments would be, and their determination each year would, of course, have to be dependent upon the conditions and needs for this particular kind of ore of the controlling stockholders of the company. Those conditions vary widely with the other sources of supply of ore which those stockholders have. The conditions of the steel business, how much the consumption of that ore was, and particularly of these ores here—the particular consumption of this particular ore by those stockholders would of course, depend upon the kind of pig iron and the kind of steel they wanted to make.

"I am not an export in metallurgy or what these ores would be good for, but I have had enough contact with the ore business to know that particular ores are used for particular purposes, and if the controlling stockholders have a large use for this particular kind of ore, they would probably fix the production higher
134 than if they had a relatively small use for this particular kind of ore. They might have other ore supplies, which would have to be taken into consideration.

"Of course, the iron and steel business is notoriously a business of feast and famine, as you call it; so you would have ups and downs.

"For example, the total production of the Lake Superior district in 1917, as I recall it, was about sixty-three million odd tons. In 1921 it dropped down below thirty million tons—twenty-three million tons, I think it was. You have those fluctuations in the total ore shipped from that district, and naturally you have to expect probably relatively larger fluctuations in the production of any one mine, which would be affected not only by the general conditions, but by the specific conditions with reference to that mine and that particular ore.

"I might also say, in addition to that, that I believe it is customary—indeed, it has been our experience—that iron-ore mines and leases and anything that is dependent for its value upon the total volume of iron ore, the rate of production, and so forth, are not customarily sold for cash. There have been sales of iron-ore mines, but I am not familiar with any, except in a general way, but the most universal practice in the Lake Superior district is to transfer title or permit the development of an iron-ore property through leases and contracts, which run over a period of years, and vary their payments with the total volume of ore taken out from the mines and the
135 annual rate of production. In my judgment, from the acquaintance I have had with it, that is the natural outgrowth of this kind of a situation, that the true value of those things can only be determined after the total ore reserves have been developed and shown and after you have been through the experience and determined what the actual production is going to be.

"'Now, I do not mean by that that it has no value, and I do not mean by that that you cannot arrive at some value for it; but so far as the cash sale value goes, customarily those contracts and interests in iron ore properties are not dealt in in that way.'"

Upon cross-examination, John B. Putnam further testified:

"'Q. You find that iron ore properties are ordinarily sold with the terms of payment closely related to the expected production; is that the idea?—A. No; they are customarily leased. You are referring now to a property owned in fee, where the owner wants it developed and the ore disposed of?

"'Q. Well, let us deal just with sales for the minute. When iron ore properties are sold, has it been your experience that payment ordinarily follows the expected rate of production and expected

life? For instance, if the mine sold is expected to have a life of 20 years, will you ordinarily find that payments are spread over 20 years?—A. I do not know of any sales of iron ore properties, except a sale that I heard about generally, which Jones & Laughlin
136 made to the Cleveland Cliffs Iron Company, of a small property on the Marquette Range. They sold that for cash a good many years ago, in connection with the sale of a lot of timber lands up there.

"'In addition to that, however, we have two properties, I think it is—two small properties in the Menomonee Range, buying a minority interest in the fee. Generally, in those cases, the thing comes up through the properties being inactive. They are subject to leases which have small minimums, and they get into the hands of some estates. They come to us with the lease, and they ask us to buy the fee.

"'Those are the only cases I know of where the fees of properties have been sold for cash.'

"I never heard of the United States Steel Company buying fees of ore properties for cash recently. If you include in a sale a situation of this kind—the Biwabik Mining Company, you might say, bought the fee of one of the forties of their mine, and they did it in this way: They took and bought it, and they gave back a contract which obligated them to pay so much a ton on every ton of ore they took out. Now, if you call that a sale, I have known of that one. I do not know as I have known of any others outside of that one.

"I never heard of the sale of the Eva or Ruth mine to the United States Steel Company, nor did I ever hear of the Eva or Ruth mine. I never heard of the Kosmerl mine. I have heard of the purchase of iron ore property by Henry Ford or his associates. I understand he bought the Imperial mine in fee.

137 "'Q. Well, is it not true that there is a possible market for iron ore properties in the Mesaba Range to such interests as the United States Steel and Henry Ford, or similar interests?

"'Mr. Tompkins. Just a moment. I object to that, on the ground that it is incompetent, irrelevant, and immaterial to the issue in this case. It is not as to whether there is any market for an iron ore mine in the Mesaba Range, but as to whether this contract of March 11, 1916, had any value, or whether there was any market for the deferred obligations under the contract.

"'The Member. The objection is overruled.

"'Mr. Tompkins. Exception.

"'A. In my judgment there is no market for a cash sale for any large or really valuable iron ore mine. Now, that sale of the Imperial mine to Henry Ford—there was an old mine, which three or four different operators had tried to make go, but had thrown it up. It was a poor quality of ore, poorly developed, and poorly situated, and, as you know, Mr. Ford has found it impossible himself, with his efficient methods, to make it go. I do not think that would be a

precedent for any other purchasers, and, as a matter of fact, Mr. Ford has now taken another property up there, which I understand he has christened the Blueberry. He has taken that by lease.
138 I think if the Imperial mine had been a really valuable mine, which the fee owners considered had a real value, they would never have gotten together on a cash price.'

"I have heard of the Leetonia mine. I never heard of that mine being sold. I heard indirectly one time that Jones & Laughlin had bought the stock of that company, as I recall it, or they had acquired all the stock or all the interest in the mine or lease, in some form, through acquiring either the stock of the mining company that held the lease or the stock of one of those furnace companies down there that had the lease. It was a complicated thing, and I do not remember the details of it, but I am quite sure it was not a sale of the mine. It is not my understanding that they went into the transaction without owning the mine, and came out of it owning the mine. I think they just owned the lease. I do not think there is any question but what the Mahoning mine could be sold; I do not think there is any question but what it could be sold for cash, or for cash payments over a period of years. What I have in mind is this, if I can make myself clear; I do not believe a seller, not under coercion of some kind, would ever part with his interest in the Mahoning mine for a cash consideration which would be as low as a buyer would pay for it, and the proof of the fact that that does not exist, is that normally in that district these interests are transferred under these, you might call them, installment contracts, although they are not installment, because the total amount is left open and indefinite.

"They are ordinarily sold with payments spread over the
139 term of years, or a substantial part of the payments, and with the total amount left indefinite and conditional upon the amount of ore extracted and the rate of payment is conditional upon the rate of extraction. I think, undoubtedly, there are some developed properties where the total amount of ore is pretty definitely known.

"I would say Pickands, Mather & Company operate about thirty-five mines. In my connection with that company, I have something indirectly to do with Federal tax matters, but that is not my specialty. In my connection with Federal tax matters I have found it necessary to fix the cash market value as of March 1, 1913, for those mines. We have to do so on every property and on every lease that we owned on March 1, 1913.

"I am 35 years of age. There is no question but what, if you have to fix a value, in my judgment, you can value any of these; you can value any contract; you can value any mine lease, but the result of our efforts to value our mining leases for depletion on March 1, 1913, has been demonstrated in a great many cases. We have come down here, and we have set up a certain value, and the department has discounted it, and finally gotten down to a figure that we could persuade them to take.

"Now, in many cases which I could name to you, it has turned out that all of the tonnage has not been valued; all of the value has not been given. We have actually shipped out of those mines a good deal more in certain cases, already; and in more numerous cases we have developed more ore, and now have in sight
140 tonnages which, when taken with the production we have shipped since 1913, will give a considerably larger tonnage than was valued at March 1, 1913. That does not mean, of course, that the properties did not have a value on March 1, 1913. It means that it had a considerably larger value, a considerably greater value, than was granted by the department, but we just had to take these lower values because of this kind of a market situation that you have that results in these leases.

"I am familiar with the Mahoning property in a general way. I have been there and I know what the holdings are, just in a general way. I am not an engineer. I just know in a general way that out of about one thousand and odd acres of land, a certain part of it is generally explored, and a certain part of it is not."

J. C. AGNEW, having been first duly sworn as a witness on behalf of petitioner, upon direct examination testified as follows:

"My full name is J. C. Agnew, and I live in East Aurora, New York. I am a mining engineer. I have been connected with the Mahoning Ore & Steel Company and first entered their employ in 1904 as an engineer. I was connected with that company until about April 1, 1923. About 1912 I was made general superintendent of the Mahoning Ore & Steel Company. On approximately
141 January 1, 1919, I was made assistant to the president of the Midvale Steel & Ordnance Company, and also director of the Mahoning Ore & Steel Company.

"The Midvale Steel & Ordnance Company acquired a half interest in the Mahoning Ore & Steel Company, through its acquisition of the Cambria Steel Company. I think that was about 1915 or 1916.

"The Midvale Steel & Ordnance Company was a combination of various companies, of which one was the Cambria Steel Company. The mine of the Mahoning Ore & Steel Company is located near Hibbing, in St. Louis County, Minnesota, on the Mesaba Range. I was resident at that mine until the 1st of January, 1919, or the later part of 1918.

"In 1916, approximately one thousand acres of mineral property was owned by the Mahoning Ore & Steel Company. At that date about six forties (six 40-acre sections), approximately 240 acres, were under operation or had ore taken from them. As to the remaining properties, some had been explored in whole or in part. The entire property never had been explored. I would say that, in addition to that portion that was in operation, about one-third had been either pretty well explored, fairly explored, or you could see some evidence of tonnage around the edges but not sufficient to determine the tonnage. In addition to those six forties that I have spoken of,

I would say that there was probably another 60 or 80 acres that was quite thoroughly explored. Of that thousand between 400 and 500 acres had either been totally or practically unexplored.

142 "The Mahoning Ore & Steel Company did not own the fee of that property; they had a 99-year lease. From my familiarity with that property and my employment with the company I am able to state concerning the period up to 1909 or 1910 whether the company had any definite policy as to the amount of annual production. Up until that time the policy was one of conservation. At a production of 1,000,000 to 1,500,000 tons, and all the physical conditions that existed at the Mahoning mine, a very reasonable cost of production could be obtained. Also at about 1,000,000 or 1,500,000 tons their royalty at 1,500,000 had reached its minimum of 12½ cents.

"I am familiar with the State tax situation prior and subsequent to 1909 or 1910. About 1906 or 1907 taxes were very reasonable on the Mesaba, and, commencing about 1907, they commenced to rise very rapidly. Take this Mahoning Ore & Steel Company. The taxes had risen from about $40,000 in 1906 to about $244,000 in 1912 and to about $482,000 in 1916.

"This policy of conservation, existing prior to about 1909 or 1910, underwent a change. That change took place about 1911, as I remember, occasioned by two things: First, the fact that the presidency of the Cambria Steel Company passed into the hands of Mr. Donner. The Cambria Steel Company was a 50 per cent owner in the Mahoning ore industry, and it was determined that more of this ore should be used at the Cambria plant at Johnstown, Pennsylvania, so that a plan was laid out for increased stripping and general

143 equipment of the property, so that this increased requirement could be met. This increased stripping took place about 1911, 1912, and 1913.

"The plan was to put the mine in position to produce 3,000,000 tons a year. It was put in that position. I might say that about that time a contract was made between the Cambria Steel Company and the Pennsylvania Steel Company, by which the Pennsylvania Steel Company had the right to take from the Cambria Steel Company ore from this mine to the extent of a portion of their requirements at Steelton, with a maximum requirement on the part of the Pennsylvania Steel Company, as I recollect it, of a half million tons. Mr. Donner also was president of the Pennsylvania Steel Company.

"From my familiarity with the Mahoning Ore & Steel Company property and the business and physical conditions surrounding it, at about March 11, 1916, I could not estimate with reasonable certainty the expected future production of that mine by years, annually.

"That mine was the property of the various shareholdings, interests that, I believe, have been mentioned here, all of whom were consumers of the ore. The production of the property was determined from year to year based on their needs, and their needs fluctuated,

for any number of reasons—business conditions, changes in their own practices, rearrangements of their own ore affairs, so it was very difficult to predicate any production. Our position as operators of the mine was at all times to be ready to meet their requirements.

"In my opinion, general business conditions of the Steel
144 Company had an effect on the annual production of the Mahoning mine. In times of depression it would be reflected in the production from the mine. The production of the mine would fall. In times when business was good the production would be up. Of course, during the war those things were restricted more or less by distribution.

"The effect of the European war, as I could foresee it, at about March 11, 1916, of course, caused an upward tendency on the annual production of the Mahoning mine, but I think it was in 1917 or 1918 that the railroad administration stepped in, and we were limited. Our people wanted something over 3,000,000 tons, but our tonnage was reduced, in my opinion, to about 2,500,000 tons. The production in 1921 is typical of an extreme fluctuation—303,000 tons.

"In March of 1916 you could not tell with reasonable accuracy the total content of ore in all of Mahoning Company's ore properties. That had something to do with the extent of the exploration. There were between four or five hundred acres of property on which the exploration was either not made or else the exploration was not sufficiently clear to give any estimate.

"'Q. Well, as to the part of the property explored, do you think that could be determined with reasonable accuracy as to the amount of tonnage?—A. That is about three hundred acres out of the entire thousand.

* * * * * * *

"'Q. Mr. Agnew, you have seen this contract of March 11,
145 1916, petitioner's Exhibit No. 1 [handing same to the witness]?—A. Yes.

"'Q. In 1916 was there any price established by public sales or sales in the way of ordinary business, of similar contracts, by which the fair market value of that contract at the time it was made, could be determined?—A. No.

"'Mr. MITCHELL. I object to that as calling for a conclusion.

* * * * * * *

"The MEMBER. The objection is overruled * * *; an exception is noted.

* * * * * * *

"'Q. Was there, in 1916, any general market for contracts of that character, and any published or current market price for the same?—A. Not to my knowledge.

"'Mr. MITCHELL. The same objection.

"'The MEMBER. The same ruling * * *; an exception will be noted.

* * * * * * *

"'Q. In your opinion, could the vendors or the sellers under that contract or any sale of the contract have realized in 1916, in cash or its equivalent, its real value?

"'Mr. MITCHELL. The same objection.

"'The MEMBER. The same ruling.

"'A. No; I do not think so.

"'Mr. MITCHELL. Exception.'"

146 Upon cross-examination, J. C. Agnew further testified:

Attorney for respondent handed the witness a map (respondent's Exhibit A), with reference to which the witness testified as follows:

"This map shows the location of the Mahoning property. The main property to which I referred is there in those eight forties [indicating on map]. Now there is a 60-acre tract right here [indicating on map]. Then, there are two in here [indicating on map]. Now, there are three forties in section 19, right next to the Itasca County line. There are two forties near the St. Paul line, again in Itasca County. Then there is one other isolated 40-acre piece."

Said map was then offered and received in evidence and marked "Respondent's Exhibit A," a true and correct copy of which is attached hereto.

The witness then, upon request of attorney for respondent, marked on said map (Exhibit A) the lands of the Mahoning Ore & Steel Company in 1916, and stated at the same time that there are three forties in Itasco County that are not marked on it.

The attorney for respondent also handed to witness a second map (respondent's Exhibit B), prepared from descriptions of the Minnesota authorities, with respect to which, witness testified as follows:

"This map (Exhibit B) shows the location of a portion of the principal ore lands of our company in 1916. They are the
147 principal ones now. The portion set out on this map includes the part which was being actively operated in 1916."

The map was then offered and received in evidence as respondent's Exhibit B, a true and correct copy of which is attached hereto.

The witness continued to testify as follows:

"I am not familiar with the Federal income and profits tax matters in which the company was involved while I was general superintendent. I am familiar with the tax situation between the company and the State of Minnesota. The State of Minnesota found an ore content only in the land set out on respondent's Exhibit B. It did not value on an ore content basis any of the company's lands other than the land set out on Exhibit B.

"Both the Minnesota Tax Commission and the Federal Government arrived at their knowledge of this property from explorations made by the company itself. Neither the Minnesota Tax Commission nor the Federal Government ever did any drilling or exploration on this property. The tax commission got data—I can not speak so well for the Federal Government—from all of the com-

panies which in any way had worked around this property, so that they had more information than we, as a company, had, and with the information thus obtained, the Minnesota Tax Commission put a tonnage on these properties. They put a valuation on the properties. That does not mean, as I interpret it, that there was no tonnage there. It simply means that, whatever you did, you would simply be putting a valuation on the ore; so why not just value it as mineral land, which the Minnesota Tax Commission had a
148 perfect right to do. They could value your property either on the basis of your tonnage, or they could simply value it as land. The Minnesota Commission did not attempt to find any tonnage on the land not shown on Exhibit B. That also applies to the United States, i. e., the Federal Government only found tonnage on the lands shown on Exhibit B.

"When I said a little while ago that in 1916 one could not tell with reasonable accuracy the tonnage content of ore, my answer applied to the entire holdings. I do not think that in 1916, the total content of ore in the lands disclosed by Exhibit B could be estimated with reasonable accuracy. Of the lands shown by Exhibit B, I would pick lots 2, 3, and 4 in section 1; lots 1, 2, and 3 in section 2; the northwest quarter of the southeast quarter of section 2; the north half of the southwest quarter of the southeast quarter of section 2, as being the only lands, in my opinion, in which the ore content could be determined with reasonable accuracy. Those lands include all of the lands in sections 1 and 2, except the northeast quarter of the northeast quarter of section 1 and the northwest quarter of the northwest quarter of section 2. I want to qualify that statement, however. There are in the area which I outlined as fully explored certain areas which are not fully explored, but they are within the operating area. My statements apply only to the portion of the section marked in black on Exhibit B.

"Now, as to the land shown by Exhibit B, where I said the ore content could not be ascertained with reasonable accuracy, that
149 situation existed because there was not sufficient exploration.

There were really three sorts of exploration that had been done there. The first was the old work which was originally done back in 1893 or 1894 or 1895, consisting of test pits, and that touched the ore and was the basis on which this property was selected originally. Then, as time went on, the properties were put in operation adjoining this area in sections 3 and 10, so that you could go there and see, standing out on the line. There were, I think, something like 15 or 20 drill holes put down in this property subsequent to that.

"'Q. You mean by "this property," the company's holdings in sections 3 and 10?—A. 3 and 10.

"'Q. 15 to 20 drillings?—A. That is my recollection.'

"The adjoining land was being mined or had been mined in 1916 so that you could see something of the ore that lay on these properties. You could see it along the boundary line.

"'Q. Well, take the two 40-acre parcels in sections 1 and 2, which you say were not susceptible of an accurate determination. Is it not true that the company's own workings adjoined both of those parcels?—A. Yes, sir; it did.'

"We had something like 15 or 20 drill holes on each of those two 40-acre parcels. Our company had an open pit in the six 40-acre parcels lying along the north line of sections 1 and 2.

150 "The operation of our company's mine as it existed in 1916 was what is commonly known as stripping. This ore was covered by a glacial drift, and this drift was taken off and removed by steam shovels, and taken out and dumped. Then the iron ore was loaded by steam shovel right into the railroad car for transportation. Everything was standard gauge. I do not know whether that is enough of a picture of it. We had an open pit something like a mile and a half long, and in some places the width was approximately 1,300 feet. The Mahoning Ore & Steel Company's property happened to be a portion of one of the biggest ore deposits of the Mesaba Range.

"Adjoining those eight forties, the United States Steel Company was conducting an operation, known as the Hull Rust mine. To the east of it there is the Sellers mine, operated by the United States Steel Corporation, and if you want to trace out that pit you will be going beyond the realms of my knowledge. I had nothing to do with their operations. I am trying to talk to you as an operator on the Mahoning Ore & Steel Company's property, and when we reached that point we were done. That is the limit. If you include the property operated by the United States Steel Company, you can conceive of an opening standing where we are now, and looking off there for a distance of pretty nearly two miles, with very irregular sides, and probably a portion of it is three-quarters of a mile wide. Throughout that area there are stripping operations going on, taking out the overburden, and then there are shovels and locomotives and rail-

151 roads and all of the activities that go to making up the mining of ore, drilling, and blasting. It is really quite a sight.

"Of the holdings of my company, as shown on Exhibit B, I made an estimate of the eight forties that I described, and I have given my best opinion as to what was in the balance of it. When I speak of an estimate of a property like this, on which I was operating—let us understand each other clearly—I was making an estimate on which I had to perform. The ore not only had to be there, but it had to be there in quantity and in the grade that I said it would be there, and I had to produce it every year, as I said I would. That is what I mean by an estimate. Now, you can take this other property and you can do as the tax commission did; you can take all the area around it and say this forty next to that produced so many tons of ore, and therefore it is reasonable to expect that this one would, and you can get a figure on it. You do not suppose that I tramped over all of that property for years without making my own guess as to how much tonnage it would produce. Of course I

did, and of course I looked at every one of those forties. I knew them like I know a book. I made a guess of what was there, but it was a guess. In reporting to the stockholders, I would definitely advise them that as to eight quarters, I had given a fairly accurate estimate, and as to the others, I would advise them that it was merely a guess, because it might be my opinion, and Mr. Bill Jones, another engineer, might come up and say, 'Agnew, I don't agree with you; it might be something else,' and I could not refute it.

152 "Before I would allow my opinions to be published, I would distinguish between my estimate and my guess. If I allowed my opinions to be published to the commissioner, I would distinguish in the same way."

Upon request of attorney for respondent, a document, marked "Respondent's Exhibit C for identification," was then handed to the witness, who testified with reference thereto as follows:

"The paper marked for identification as 'Respondent's Exhibit C' is my own affidavit. I signed that and swore to it. That affidavit sets out my opinion of the ore content on this land that we have been talking about."

Said respondent's Exhibit C for identification was then offered and received in evidence as respondent's Exhibit C, which is as follows:

Respondent's Exhibit C

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. C. AGNEW, being duly sworn, deposes and says:

That he resides in Ardmore, Montgomery County, Pennsylvania. That he is a mining engineer, and is familiar with the development, exploration, and operation of the properties of Mahoning Ore & Steel Company, located in St. Louis and Itasca Counties, Minnesota, operated by said company under lease from Grant Iron Mining Company.

That deponent made estimates from time to time of the amount of stripping required to be done upon said properties, obtaining
153 the information upon which such estimates were based, from explorations and drillings made thereon. That from the estimates so made, it appears that on March 1, 1913, on tract 1 (lots 1, 2, 3, and 4 of section 1, and lots 1, 2, 3, and 4 of section 2, of township 57, range 21), the stripping to be done aggregated 11,580,000 cubic yards. From the experience of deponent and the Mahoning Company in connection with the stripping of said property, deponent avers that an average cost of 22.4¢ per cubic yard is a fair estimate of the cost of stripping said property, making a total cost of the stripping remaining to be done thereon of $2,591,920. That the cost of stripping done on said property prior to March 1, 1913, was $1,893,790.81, making the total cost of stripping said property $4,485,710.81. The tonnage estimated in said property as

of March 1, 1913, is 64,756,588 tons, and there was mined out prior to 1913, 16,581,337 tons, making a total of 81,337,925 tons. Averaging the total cost of stripping over said tonnage gives an average cost of stripping of 5.5¢ per ton.

As to tract 2 (NW. quarter of SE. quarter and N. half of SW. quarter of SE. quarter of section 2, township 57, range 21), the stripping to be done on March 1, 1913, aggregated 1,500,000 cubic yards. Assuming a cost of 22.4¢ per cubic yard, makes a total stripping cost of $336,000 for tract 2, or, distributed over all of the tonnage in the property, 9,450,891 tons, gives an average cost of stripping of 3.55¢ per ton.

As to tract 3 (being SE. quarter of SE. quarter of section
154 3 and NE. quarter of NE. quarter of section 10, township 57, range 21), the stripping to be done on March 1, 1913, aggregated 13,500,000 cubic yards (each cubic yard of taconite in such computation being treated as three cubic yards of stripping). At a cost of 22.4¢ per cubic yard, the total cost of stripping will be $3,024,000, or, distributed over the tonnage in the property, 7,533,969 tons, gives an average cost of stripping of 40.1¢ per ton.

As to tract 4 (being N. half of NW. quarter and SE. quarter of the NW. quarter and NW. quarter of SW. quarter), the stripping to be done aggregated on March 1, 1913, 15,200,000 cubic yards (each cubic yard of taconite in such computation being treated as three cubic yards of stripping). At a cost of 22.4¢ per cubic yard, the total stripping cost will be $3,404,800, or at the rate of 31.8¢ per ton on the 10,709,600 tons alloted to the property.

From the information at hand as of March 1, 1913, we would estimate that tract 1 could produce 2,300,000 tons for a period of 25 years, and that the tonnage remaining in tract 1 at the end of this 25-year period would be mined out in 5 or 6 years.

This prediction is based on operating the property in such a way as to permit of producing 2,300,000 tons over the longest period possible, which would be accomplished by cleaning up or "scramming" the ore lying on the rock as mining operations progress and not postponing this "scramming" until the last possible
155 moment. As a matter of fact, this policy has been followed in the past, although to date the number of places where the ore has been bottomed are very few, comparatively speaking. In view of the extent of this property, there is no reason why such a policy can not be followed out, and in our judgment it should be.

(Sgd.) J. G. AGNEW.

Sworn to before me this 20th day of November, 1920.

[SEAL.] (Sgd.) GRACE M. WOODRUFF,
Notary Public.

The witness (Mr. Agnew) then continued his testimony as follows:

"The map (respondent's Exhibit B) sets out tracts 1, 2, 3, and 4, referred to in my affidavit."

The witness then marked the map (respondent's Exhibit B), to indicate the respective tracts and continued as follows:

"From an examination of my affidavit I find that I made estimates of all four tracts shown on Exhibit B, and did not distinguish my estimate in any way. I did not distinguish my opinion as to the four tracts as between estimates and guesses. I made no distinguishing marks at all in this affidavit. From an examination of this affidavit, Exhibit C, I find that I have also given opinions of probable life of the portion of the company's holdings that were being actively operated. This is set forth in the third paragraph on page 2 of the affidavit as follows:

156 "'From the information at hand as of March 1, 1913, we would estimate that tract 1 could produce 2,300,000 tons for a period of 25 years and that the tonnage remaining in tract 1 at the end of this 25-year period would be mined out in five to six years.'

"There was more difficulty in estimating a probable life for tract 2, tract 3, and tract 4 than there was for tract 1. This is an estimate of what it would be reasonable to assume that this tract 1 produced over the period from March 1, 1913. Now, that does not mean that if the stockholders wanted three or four million tons it could have produced it. It is merely an estimate of what they could produce. This estimate was made for purposes of depletion of that property, and was stated as from March 1 to May 8, 1921. I was asked to make this estimate by the president of the company, in order that the company might prepare its case for depletion. That is what this estimate is. It is one estimate of the probable life of tract 1."

Attorney for respondent then handed the witness another map (respondent's Exhibit D), with reference to which the witness testified as follows:

"This is a map of tracts 1, 2, 3, and 4 that we have been talking about and surrounding country. It sets out generally the drill holes and the mining pits in that country and as to that area. It is dated January 1, 1913, and was prepared by the engineers of the company."

157 Said map was then offered and received in evidence and marked "Respondent's Exhibit D," a true and correct copy of which is attached hereto. Witness then continued to testify:

"I do not know what the date means, whether that was the date of preparation or not. There have been made here additions to the date and legend. Whether that is the date on which the map was made, or whether it is the date on which the map was to be used, I am not sure. The date, January 1, 1913, is on it, and it would be my best information that this map was prepared for use in valuing the properties as of January 1, 1913, and would show the condition as of January 1, 1913.

"As to tract No. 3 I find that almost all of the west side adjoins an existing pit, and that half of the east side of that tract adjoins an open pit. As to tract No. 4 I find that a quarter of a mile on the east side and a quarter of a mile on the north side adjoin an open pit.

"As to tract No. 2 I find that considerable portions of the boundary of that tract adjoin an open pit. Tract No. 2 was not thoroughly explored. There is not much question about the tonnage, in that, and this is simply corroborative evidence. As to tract 3 and tract 4 it was on such data as mentioned that the Minnesota Tax Commission prepared their tonnage estimate on each portion. My affidavit is dated in 1921. Probably you did not have the record here.

"We drilled some holes on these properties to see whether the tax commission's estimate was too high. Such holes as we did drill
158 indicated that the tax commission's estimate was a conservative estimate, and we stopped there. My affidavit is based not only on the data indicated by the map, but on later explorations, and those later explorations indicate that the estimate in my affidavit was correct.

"In estimating the future production of the Mahoning mine as of 1916, I think the first factor is, as I have stated, the physical condition of the property. The property was able to produce 3,000,000 tons or more, so far as the property was concerned. Now, the other phase of the situation is the one that I went into a little earlier in my testimony, of the various requirements and demands of these stockholders from time to time, and that you can only judge from their plans and from what they proposed to do. The general demand for iron ore in the United States would be an important factor, but you are dealing here with one of the cheapest ores that are produced on the range, and you always have the other phase of the situation, that your steel company is striving for cost, and they might use that ore, because there is a saving even when times are hard. It is not so important when they are making money, so you have all those things to balance there. The general demand in this country for iron ore would be an important factor. Another important factor would be the condition of the industry in this country, i. e., whether times were prosperous or otherwise. It has been my experience that the demand for iron ore bears a fairly close relation to the general prosperity of the country.

"I am familiar with a publication called 'The Iron Ores of
159 Lake Superior,' put out by Crowell & Murray. They are always kind enough to send me one. I would regard the figures set out in that book for yearly shipments from the Mahoning mine as reasonably accurate."

Thereupon counsel for respondent read into the record the statement of yearly shipments of ore, as shown by the book The Iron Ores of Lake Superior, for a period from 1900 up to and including 1912:

1900	911,021 tons.	1907	1,564,382 tons.
1901	765,872 "	1908	611,592 "
1902	1,038,645 "	1909	1,561,893 "
1903	1,009,446 "	1910	1,515,728 "
1904	706,325 "	1911	1,011,945 "
1905	1,001,661 "	1912	1,518,643 "
1906	1,274,232 "		

"These yearly shipments of ore would, for all practical purposes, be equivalent to the annual production, and the record just read corresponds substantially with my own record.

"I do not think that the record just read coupled with the record of production set out in the stipulation indicates that the production of this mine is on a pretty even basis. If you will continue on there, you will see that there has been an increase.

160 "'Q. Yes. And don't you find that increase is a steady and somewhat slow increase?—A. Well, you have the figures there. I would say that there were some pretty substantial jumps there. I have not the figures in front of me.'

"We have in these records of production that there was a change in policy in this mine along about 1912, 1913 or 1914. The 1912 production is 1,518,000 tons. In 1913, it was 1,500,000. In 1914, the beginning of depression, it was 1,212,000. Then we jump up to 2,300,000, an increase of 1,000,000 tons. Leaving out the depression here, there is an increase of 800,000. Then we went along 2,300,000, 2,200,000, 2,500,000. Then you get your postwar period, 1,200,000, 1,700,000, and getting into 1921 we only had 303,000. From the standpoint of the production, 1921 was the worst year in the history of this company, after we got into active production.

"I would not say that the period from 1913 up to 1926, inclusive, could be considered as a representative period, taking the period as a whole. I would say that for two reasons. You have your war years there of 1917 and 1918, and then you have your postwar years there, and that is evidence again, you see, by 1923, where you get to 3,000,000 tons. It is pretty hard, I think, to make a statement that any past ten years is necessarily indicative of what the next ten would be on this property, because you have all of those changing factors there. For instance, this property in 1923, changed hands again.

The interest which the Midvale Steel & Ordnance Company
161 acquired from the Cambria Steel Company passed in 1923 into the hands of the Bethlehem Steel Company.

"I don't know the maximum capacity of that mine in 1916. Up to 1914 or 1915 I could have shipped six or seven million tons per year, if anybody could have hauled it away from there. We had capacity for 3,000,000 tons during a year, but it was not contemplated that the company would produce 3,000,000 tons a year. The company's plan or program which resulted in the stripping of 1912 and 1913 was to have the property always ready to supply to its stockholders at least 3,000,000 tons per year. Now, in order to do that, there were certain periods of war involved in the proposition, that I do not know we need to go into here, but you had to have sufficient area, and sufficient equipment, so that in addition to producing this 3,000,000 tons of ore, you had to produce 3,000,000 tons of the character of ore that your stockholders desired, roughly speaking, Bessemer and non-Bessemer. Three million tons a year is all that we planned to produce.

"We did not actually produce 3,000,000 tons a year, but that was the plan. Otherwise, there would not be any need for that investment in stripping. I think we could have produced 3,000,000 tons in 1913, but I am not sure whether we could have made the grade or not, because our stripping program was not completed at that time. I do not think it was actually completed until 1914, as I remember it.

"The actual production in 1914 was 1,212,000 tons. We
162 have that discrepancy between actual production and this plan, because, if you will put your memory back to 1914, it was a pretty poor year in the iron and steel business and in business generally.

"The next year, there was considerable demand for iron ore. You see we had reached 2,300,000, but we were still 700,000 short of 3,000,000, because the stockholders did not want it. I can not explain why they never did want it until 1923, because I did not know their business. I mean, here were a group of men, six of them, all administering, or most of them, as presidents of various steel companies, with all of the ramifications that they involve. Now, they gathered together and they said, 'We want this many tons out of there.' I have seen them change their minds two or three times in six months, but it would be pure supposition on my part to try to say what factors determined them in setting that tonnage. Of course, you have always to remember that in this situation here you had a lot of stockholders who wanted to agree—I mean, one fellow, if he found that the majority wanted a certain thing, if he possibly could, he would agree with them, and then he would go out and arrange his own affairs accordingly.

"As to making any estimate of the probable life of this mine as a whole, you can divide tonnage by any production that you like, and of course, you get all kinds of lives to it, and then you can take this affidavit, which is as near as I ever came to it. When you commence
to talk about these forties out to the west of there, in Section
163 18 over in Itasca County, there is no basis whatever to go on.

This affidavit is the first real attempt that I ever made at determining the life. We did make an estimate of the glacial drift on top of the ore in tracts 3 and 4. I did exactly as you indicated. We went and observed around the periphery of these properties, and arrived at what the overburden was. We took drill holes such as we had, and found out what there was in those, and on that basis we made an estimate. We did make an estimate of the ore body itself in that affidavit. I think you will find that estimate, if my recollection is correct, is the same as the Minnesota Tax Commission used.

"In my reports to stockholders I did not find it necessary to estimate the future life of the property. You see when you are dealing with such a large ore body as that, if you predicate your operating conditions for ten or twelve years ahead, that is as far as

you need to go. There is no use of your going further, because you get into the realm of uncertainty, where you accomplish nothing. Going back to that blue print there, there are some of these drill holes that do not go to the bottom of the ore body at all. I remember one that went down for about 75 feet, and then it stopped at a given level.

"I found it necessary to forecast into the future for 10 or 12 years operation. We had to make sure we had ore enough uncovered of a proper grade, and all that kind of thing, to cover the period such as we could prepare for. In the conduct of the appropriation, it was necessary that I should make my estimates on from 10 to 12 years in the future.

164 "We would not have the same uncertain factors confronting us in estimating 12 years into the future that we would if we tried to go further into the future, because in the 10 or 12 years that you are dealing with—you are not trying to delimit, to set the final limits of your tonnage. For instance, in that property, you sometimes work five or six or seven or eight years, and you only lower yourself ~~25~~ feet, or maybe, at the most, 50 feet in that length of time; so there is a difference there between the estimate that an operator might make for the purpose of laying out his operations and an estimate that an individual is setting of the total tonnage in the property.

"'Q. Well, I will ask you other questions. You did consider it practical and feasible to attempt to forecast the future requirements of the ore for 10 or 12 years, did you?—A. Yes.

"'Q. Could you have gone as far as 15 years?—A. I suppose you might; yes.

"'Q. Well, what about 20 years?—A. Yes; I think you could have done that.

"'Q. What about 25 years?—A. Well, I don't know.

"'Q. You begin to get doubtful at 25 years?—A. I do.

"'Q. So that somewhere between 20 and 25 years, you think it is impractical to attempt to estimate the future requirements in ore?—A. Wait a minute, Mr. Mitchell. You are trying to lead me into something, and I am trying to tell you my story here the best way I can. Now, you asked me—you say, could you do it for 15

165 years; could you do it for 20 years? Think of the things that are involved in that. How do I know that this mine will not be producing 4,000,000 tons 15 years from now? It all depends upon the assumptions that I make.

"'Q. Well, is it not necessary?—A. The facts are—well, all right; you go ahead.

"'Q. Is it not necessary in the conduct of this business to make assumptions based on your very best judgment?—A. Yes; it is.'"

Upon redirect examination, J. C. Agnew further testified:

"Referring to my affidavit dated May 8, 1921 (Exihibt C), tracts 1, 2, 3, and 4, mentioned therein, did not contain all of the ore properties of this company as of 1916. There were about 10 forty-acre

tracts that were not contained in tracts 1, 2, 3, and 4. There had not been any exploration on those tracts to any appreciable extent. I don't think you could say there was none. I think there were a few tests, but nothing that you could call exploration. They were mineral lands, so acquired and so held by the company. As far as I know, nobody in 1916, or up to to-day, had any definite idea of the extent of ore under those properties that are not so included in this affidavit.

"Referring again to the same affidavit, and referring now in the same connection to Exhibit B, as to tract No. 1, I am to be understood as having said that all of these forties had been thoroughly explored, except the two extreme ones, and a little bit of one
166 of the others. Tract 2 is very well explored, I would say. Tract 1 is where the main operating property is located. As to tracts 3 and 4 the estimates contained in my affidavit are based on all the data that we could accumulate from adjoining properties, plus whatever information we could gain from the drilling. I think, as I recollect it, about two or three years after the tax commission took and changed the valuation of that property, we drilled a couple of those forties, about five holes to the forty, the idea being that we felt it would be unwise to continue to pay on such tonnage unless we could reasonably assume it was there. These 28 holes, coupled with the information that could be obtained from the outside, led us to believe that that estimate could not be lowered, and therefore we quit. I do not think we drilled all of those forties. That is my recollection. My recollection further is that there were some exploring operations carried on with respect to tracts 3 and 4 after 1916 and before this estimate in the affidavit of 1921. I am quite sure that the estimate of content as to tracts 3 and 4 is exactly the same as the Minnesota Tax Commission figures. That is where, I think, I got them originally; that is, the Tax Commission of Minnesota assigned a tonnage to each one of those forties. Of course we carried that along on our records, where they reported it to us every day, and we did this little drilling to find whether it was possible to refute any of these estimates, and we found it was not. We stopped drilling and, I think, those are the figures we used. I am pretty
167 certain of it. In speaking of refuting those estimates, I mean by that, whether they were too high.

"'Q. Now, referring to a part of this affidavit, respondent's Exhibit C, which you have read from, and concerning which Mr. Mitchell asked you some questions, from the information at hand as of March 1, 1913, you would estimate that tract No. 1 only could produce 2,300,000 tons for a period of 25 years, and so forth, that estimate having to do with the production. State whether or not that was made from an operating standpoint.—A. Well, yes; it was made—I was certain that it was possible for the property to do at least that, if I make myself clear, and I was not making a statement there that, in my judgment and to my knowledge of the property, it could not be performed.

"'Q. Now, in answer to one or two of Mr. Mitchell's recent questions as to the necessity of making estimates for a period of 10 or 12 years—I believe that is the expression used—state whether those estimates were made from an operating standpoint.—A. They were.

"'Mr. MITCHELL. Would you mind defining that a little bit more?

"'Mr. FORD. The capacity of the mine, rather than outside business conditions and all the other various elements.

"'Mr. MITCHELL. I see.'

"In making these 10-year and 12-year estimates, and in what I said in my affidavit, I took into consideration other factors besides mine capacity. I had to take into account two things.
168 One was the varying requirements of these stockholders, who might come and call on this property for a very large tonnage of ore, and occasionally as they did come in, in the middle of the summer, and change their minds and want the production stepped up. Then, I also had to take into account changes in their requirements as to grades of ore, which would involve mixing, and accessibility to the different parts of the mine where the different qualities of ore occurred. It was my duty as manager of that mine always to be ready for whatever they would ask for."

Upon recross-examination, J. C. Agnew testified as follows:

"In making my estimates, as set out in my affidavit, that the mine could produce 2,300,000 tons a year, I was not referring solely to the capacity of our mine when I made that statement. This statement was made up for depletion purposes, and I know there was considerable discussion of this proposition, as to how this depletion would be handled, what the tonnage would be, and all that kind of thing; and my recollection of it is that this 2,300,000 tons was arrived at in that way, taking into account what other people might want us to do and what the mine could do, and weighing all the various factors.

"It was not my best estimate of the probable future production. It is one estimate of the life of this mine, of the annual production of this mine. I have made estimates, as I told you, on various
169 bases, that I must be prepared to meet various demands for tonnage of the mine; the mine must always be prepared to do that. If that had been an estimate of the ultimate annual capacity of the mine, I expect I probably would have put down five or six million instead of 2,300,000, but I would not put it down for that length of time. If anybody had asked me what that mine could produce as of 1914, I could have said five or six million tons a year.

"'Q. There is just one thing that I want to get straightened out on. I understood you to say, referring to those eight forty-acre pieces that are in a row, that the middle six of those were susceptible of a reasonably accurate estimate of the ore content, and that the two end quarters were not. Did I understand you correctly?—A. Yes.

"'Q. Now, I want to call your attention to your testimony given in the hearing of the appeal of Julia Andrews Bruce.

"'Mr. TOMPKINS. What page?

"'By Mr. MITCHELL:

"'Q. On page 28 of that record, the last five lines of that page, and I ask you if you did not say that there was one forty which lies east of the six middle forties on which a reasonable estimate could be made?—A. That is in the record there, and if it is there, I probably said it.

"'Mr. FORD. Read after that, Mr. Mitchell.

"'Mr. MITCHELL. He is reading here——

170 "'Mr. FORD. Well let him read the testimony.

"'Mr. MITCHELL. Suppose you read your answer.

"'The WITNESS (reading):

"'Why, I would say that as to approximately the actual operating area for this purpose we will call six forties or 240 acres that was developed. There was one forty which lies east of the one there; I think a reasonable estimate could be made—forty to the west would be more in doubt. There was an additional 60-acre tract which lay not far from the present operation, where a reasonably accurate estimate could be obtained, but the rest of the property would be a matter of just judging.'

"'By Mr. MITCHELL:

"'Q. So, on your former testimony you said in effect, did you not, that the——A. If that is in the record, I said it.

"'Q. (Continuing.) That the east forty in the row of the eight forties was susceptible of a reasonable estimate of ore tonnage?—A. If that is in the record, I said it.'"

The foregoing was all of the evidence introduced on behalf of petitioner in this cause.

171 Respondent thereupon introduced certain evidence, as follows:

E. J. STACK, having first been duly sworn as a witness on behalf of respondent, on direct examination testified as follows:

"My name is E. J. Stack. I am a mining engineer, and I am employed by the Government as a valuation mining engineer. Including the time at college, I have been a mining engineer about twenty years. I valued properties on the Mesaba Range and other properties in the Lake Superior district ever since I have been with the Government. In fact, I have not done anything else but appraise properties in the Lake Superior district since 1922. I have traveled over the district, but once or twice I examined the different properties. I have examined and reported on ore mines owned and operated by Butler Brothers, Marquette Iron Company, the Hull Rust, and Mahoning properties, and some other smaller ones which I have forgotten. I personally examined the properties of the Mahoning Ore & Steel Company in 1925.

"'Q. Did you have any part in arriving at the commissioner's ore estimate of approximately 83,000,000 tons and a life of 45 years, as of March 11, 1916?

* * * * * * *

"'A. Well, I examined it, and I think in the spring of 1925 I made an appraisal. The ore estimate used in my appraisal
172 was identical with the one used in the present valuation. The life of the mine used in my appraisal was 42 years.'

"In finding the ore tonnage and the probable life of a mine such as the Mahoning mine, we estimate the ore reserves, and in computing the ore reserves we get all available data, such as drill records, underground development work, shafts, prospects, and so forth, and surface indications, together with any information that might be obtained from operations on the adjoining properties. We quite often refer to estimates by the State of Minnesota as a check against the estimates used in the unit, to verify our estimates. The investigations conducted by the State of Minnesota are considered among mining men very reliable as to the tonnages and the estimates of the ore reserves, but I do not know about their estimates as to the life of mines. I have no information about their estimates of probable life or their values. The Mahoning mine is one of the leading and largest iron-ore properties; that is, combined with the Hull Rust mine, it is one of the largest producers of iron ore in the country. That combined property comprises one big pit, about two miles long and three-quarters of a mile wide. I do not know of any active ore property in the world larger than that in 1916. There were some inactive, undeveloped ore regions. I would say that in 1916 it was the largest developed iron mine in the United States.

"The iron-ore formation on the Mesaba Range is a well-defined formation. At this particular occasion they have a well-
173 defined foot wall, regular, uniform foot wall, outcropping just north of the Mahoning tract No. 1, inclined at an angle of about 11 or 12 degrees, reaching a depth on the south side of this tract 1 of about a hundred feet; and underneath there is a sedimentary formation. Above this foot wall is the iron ore of very good grade; in fact, one of the best grades of iron ore in the United Statese, about 60 per cent iron and very low in phosphorus. Above the iron ore is the surface of overburden of glacial drift, varying from 5 to 20 or 30 feet thick.

"The method of mining typical in that neighborhood is strip mining. Drag lines and every form of steam shovel are used in removing that overburden. That is hauled away from the property, and the ore removed by the steam shovels.

"It is feasible to estimate the ore content. You can make a very accurate estimate of it. I would say the degree of accuracy obtained in estimating ore reserves in this property would be much higher than at any other mine that I know of, because of the geological conditions and the development of the drill

work, and the activity of adjacent properties. It is much easier to make a more accurate estimate of the Mahoning reserves than it is of others; because of mining conditions, the geological formation and the types and quality and character of the ore. Compared with the estimates of ore reserves in nonferrous metal mines, such as are found in Montana and Idaho—the estimate on the Mesaba Range was considerably more accurate. There is really no comparison. I do not know of any mining section on which it is easier to estimate the ore reserves than it is on the Mesaba.

"I am familiar with the book 'Report of the Minnesota Tax Commission, 1914,' and particularly the sections of that book dealing with Minnesota iron-ore properties. The sections of that book dealing with Minnesota iron-ore properties are regarded as authoritative scientific utterances."

Thereupon, attorney for respondent read from page 79 of said report the following:

"It was apparent to the commission that with the unusual character of the Mesaba ore deposits, being contained in detached rock basin of greater or less extent and covered by a glacial drift overburden of a few feet to not over 200 feet, it was only a matter of sufficient churn and diamond drilling, test pitting and other exploration and development work and a plotting of the result for each five feet of drilling, to calculate the quantity and grade of each layer of iron ore, and to obtain the total tonnage and its general average grade."

He further read from page 82 of said report, the following:

"Minnesota is especially fortunate in having its mineral wealth deposited in such form that it can be accurately measured and valued, and is probably the only state that has carefully measured the known iron-ore deposits, and is assessing such wealth on a strictly legal basis."

The witness then continued his testimony as follows:

"Except for the very last statement dealing with the method of assessing this wealth, I agree with the statements just read. I have no information one way or the other as to how Minnesota assesses this wealth, whether it is fairly done or otherwise. I think that the commissioner's estimate of a probable life of 45 years for this mine is a very accurate estimate as of March 11, 1916. As to the factors that enter into such an estimate, in underground mines, the physical capacity is quite important, but if it is a large open pit, it is not. There are other elements more important—economic conditions, especially in the steel industry, and the number of properties operated by the company operating this particular mine also has a very important bearing, together with the terms of the leases as compared with other leases, and the local conditions of this mine; that is, it may be to the operating company's advantage to curtail operations at one mine and increase them at another. I have knowl-

edge of several sales of iron-ore properties since March 1, 1913. The Meyers mine on the Mesaba Range was sold in 1917. The Kosmerl mine on the Mesaba was sold January 1, 1913. The Kosmerl mine was sold to the United States Steel Company. The owners received promissory notes payable over a term of years, about 30 or 40 years. I do not remember whether there was any cash
176 involved or not. Those notes were for fixed amounts, independent of the time. The total sale price was computed by estimating the ore reserves, multiplying that by the royalty rate, which was 25 cents, I think, or 40 cents—there were about 10,000,000 tons—and making the total sales price of about $4,000,000, to be received over a period of 40 years, in equal annual payments. The total sales price was based upon the estimates of ore content and probable life. That case was involved in a proceeding before this board. The name of the appeal was the Ruth Iron Mining Company. The Donora mine on the Mesaba was sold in April, 1913, on the same basis and the same terms as the Kosmerl sale, i. e., promissory notes, based on estimates of probable life and royalty rate existing under the lease. Higgins No. 1 and No. 2 were sold in 1917. The consideration for that sale was similar to the others. That was paid for again in promissory notes. Other sales were the Ray Prospect, Gilbert in 1917, and the Midway in 1913. I don't recollect just exactly how the consideration was arrived at for the first property. The sales price was arrived at in the same way, but I think the majority of these sales were based on ore estimates at the date of sale. I do not know of any iron properties sold where the sale price was fixed on any other basis than estimates of ore content and probable life. I regard the Kosmerl transaction as a typical transaction. Another mine that I did not mention is the Tener, which was sold in 1922. That is on the Mesaba Range also."

177 Upon cross-examination said E. J. Stack further testified:

"I did not say that the first trip I ever made out to this Mahoning property was in 1925. I said I examined the property at that time. I have been over the adjoining properties. 1925 was the only time I have been on that property.

"I had no part in fixing the valuation that the Commissioner of Internal Revenue arrived at in this particular case. I do not know whether there was any one year down to 1926 in which the Mahoning mine produced exactly 1,841,300 tons. The production varies very greatly from year to year. The annual production over the period from 1913 to 1926 fluctuated from year to year. When the commissioner estimated in this case that the life of this mine would be 45 years, that was based on the assumption that the mine would produce an average annual production of 1,841,000 tons.

"'Q. If the annual production, in fact, was not 1,841,000 tons, then the assumption as to a 45-year life would be changed, would it not?—A. Not necessarily.

"'Q. Not necessarily?—A. No, sir.

"'Mr. MITCHELL. You are speaking of the average production or the average annual production?

"'Mr. TOMPKINS. I am speaking of the fact, that if the mine produced, we will say, 500,000 tons or more annually, each year, you would have to assume a different life than 45 years from March 11, 1916.

178 "'The WITNESS. If the average annual production was any other than 1,841,000 tons, it would change the life, certainly.

"'By Mr. TOMPKINS:

"'Q. As a matter of fact, did the commissioner, in deciding these cases, have any expert make a personal examination of this Mahoning property, or did he not rely upon the figures which he had obtained from the Mahoning Company, and which had been used for purposes of fixing the depletion rate for that company?—A. That valuation was made before my time in the unit.

"'Q. You do not know anything about that?—A. No.

"'Q. Don't you know that since this case was decided by the Commissioner of Internal Revenue, the commissioner has fixed, in a depletion proceeding, a different life, a different annual production for this Mahoning mine than that upon which he decided this case?—A. As of the same basic date?

"'Q. Yes.—A. He did not; not to my knowledge.

"'Q. Not to your knowledge?—A. No.

"'Q. That appears in the stipulation. You referred here, Mr. Stack, to a number of sales of different ore properties made during the period from 1913 to 1917. As I understand it, in all those properties the prices which the purchasers were to pay for the properties was fixed, only the price was not paid in cash; it was

179 paid by a series of promissory notes, each for a fixed amount, and extending over a period which you say was estimated to be the life of the mine. Is that true?—A. Well, the sales price was arrived at by taking into consideration the estimated tonnage, the operating life and royalty rate. Now, whether those promissory notes extended over the same period, I could not say.'

I did not play any part in the negotiations leading up to those sales; I know nothing of them of my own knowledge. In most of them the sale price was fixed and definite and paid for by promissory notes.

"'Q. Do you know of any case in which stock in an ore company such as this—and I call your particular attention to the fact that I used the word "stock," not sale of ore property, but stock—was sold under a contract in which the total amount which the sellers would receive under the contract was not fixed but indefinite?—A. I do not recall any right now.

* * * * * * *

"'Q. Did you know, Mr. Stack, that of the mineral lands of the Mahoning Ore & Steel Company there were somewhere between three and four hundred acres that had not been valued at all?—A. Three or four hundred acres of undeveloped land.

"'Q. I beg your pardon?—A. Undeveloped land. We valued mineral land only.

"'Q. You did not value that land?—A. No.

"'Q. I see. Let me ask you another question, and then I will be through.

"'When you said you valued—what kind of land only?—A. Mineral.

180 "'Q. That is, you mean by that as to which complete exploration has been made?—A. Land which was known to contain minerals.

"'Q. Do you want to take the position that three or four hundred acres were known not to contain minerals?—A. No; I am not taking that position.

"'Q. Well, I just want to make it clear. By the term that you have used, by calling the other mineral land, I thought you meant to indicate this was not mineral land.—A. They were not referred to us for appraisals, because it was not known that they contained mineral as of that date.

"'Q. In other words, whether or not they contained mineral you do not know. Is that correct?—A. I do not.'

"The three or four hundred acres that I have referred to were on the Mesaba Range. I think a few of those 40-acre tracts were near the edge of the Mesaba Range, and some of them were toward the center.

"'Q. I say it has been testified to here that this Mahoning property, the property which is leased to the Mahoning Company, consisted of approximately slightly over a thousand acres of mineral land. You do not dispute that acreage, do you?—A. Not the acreage; no.

"'Q. Not the acreage; it has also been stipulated in this case that the commissioner, in arriving at his estimate as to the life of the mine and as to the ore reserves, based that estimate upon the
181 content of recoverable ore in only approximately 620 acres out of the entire property leased by the company, and, therefore that there must be four hundred and some acres in the property which had not been explored or taken into consideration in arriving at this estimate; is that true?—A. They were not included in that valuation.'"

Upon re-direct examination E. J. Stack further testified:

"The land on which the Government found mineral content is shown on Exhibit B. The Government did not find a mineral content for the remaining land which seems to be indicated on Exhibit A, because it has no record of any mineral on those tracts. The commissioner has no information whatever that they contained any mineral. They are unproven as far as mineral content is concerned.

"'Q. There has been some reference here to two appraisals by the commissioner. Are you familiar with the stipulation of facts which sets out those two appraisals?—A. Yes.

"'Q. It is true, is it not, that one of those appraisals was as of March 1, 1913, and the other one was as of March 11, 1916?—A. Yes, sir.

"'Q. The commissioner, as of March 1, 1913, estimated the probable life as 40 years, and as of March 11, 1916, as 45 years. Are those appraisals consistent or inconsistent?—A. I consider those two appraisals very consistent.

"'Q. Why do you say that?—A. Because they are made on
182 different basic dates, as of different basic dates. In each case, you had a different set of facts on which to base the valuation.'

"In the later appraisal you had additional history of three years to consider. The production for those three years was slightly less than 2,000,000 tons a year and during those three years the demand for iron ore was about the average."

Upon recross-examination said E. J. Stack further testified:

"I say the production of this mine for three years preceding 1916 was slightly under 2,000,000 tons a year. The production for 1913 was about 1,500,000 tons. For the year 1914 it was about 1,212,287 tons. For the year 1915 the stipulation in evidence shows that it was 2,311,940 tons."

H. L. PARRISH, having been first duly sworn as a witness on behalf of respondent, upon direct examination testified, as follows:

"My full name is H. L. Parrish. My occupation is valuation engineer in the Bureau of Internal Revenue. I am a mining engineer, and have been in the mining business, including the years in school and working, from 1910. I have been on the ore property mined by the Mahoning Ore & Steel Company a good many times. In 1923 I worked on it and am familiar with the property. I am also familiar in a general way with the Mesaba Range, particularly with that part of it around Hibbing, and also some of the portions
183 lying further east and further west. My work in 1923 was largely in the examination of and surveying of the open pit around the mines in various parts of the Mesaba Range. I know that the ore content of every mine on the Mesaba Range that I had any connection with had been very fully estimated. I am not so certain as to what the probable life of any particular property may have been. That would depend upon the program of the operator. It is practicable for one conversant with all the facts to make an estimate of probable life."

Upon cross-examination said H. L. Parrish further testified:

"Q. These estimated ore reserves of properties on the Mesaba Range you have testified to have been estimated for the purpose of fixing depletion rates for those companies up there, as required by law; is not that true?—A. Not always so; no, sir.

"Q. Not always so?—A. What estimates are you referring to?

"Q. You have testified here, in answer to Mr. Mitchell, that the ore reserves of most of those properties on the Mesaba Range have

been estimated and valued. Did you not testify to that?—A. I testified that they could be estimated and that they had been estimated; yes, sir.

"Q. And that they had been. As a matter of fact, all of them had been estimated for the purpose of fixing depletion rates for different companies; is not that true?—A. That is probably true, but I did not have that in mind in my answer.

184 "Q. And in order to fix those depletion rates, you have to make some estimate of the ore reserves; is not that true?—A. That is true; yes."

The foregoing testimony of E. J. Stack and H. L. Parrish was all the testimony introduced on behalf of respondent in this cause.

True and correct copies of all of the exhibits referred to in the testimony and proceedings, except such as are fully set forth herein, are transmitted herewith and made a part of the statement of evidence, as if fully set forth herein.

Thereupon counsel for petitioner and counsel for respondent stated that they had no further evidence to present and submitted the case to the member of the United States Board of Tax Appeals hearing the proceeding.

The petitioner, Edith Andrews Logan, tenders and presents the foregoing as a statement of the evidence in this case and prays that the same be approved by the United States Board of Tax Appeals and made a part of the record in this cause.

CHARLES D. HAMEL,
MILLARD F. TOMPKINS,
JOHN ENRIETTO,
Attorneys for Petitioner,
906 Southern Building, Washington, D. C.

Approved and agreed to.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

185 Before United States Board of Tax Appeals

[Title omitted.]

Order approving narrative statement of evidence

I hereby certify that the foregoing statement of evidence has been examined by me and found conformable to the truth and contains all of the evidence in said case in narrative form, the exceptions taken to rulings, and the proceedings had upon the trial of said cause. Where the testimony here is set forth in the form of questions and answers, it is so set forth that the evidence might be clearly understood.

It further appearing to the board that it is proper and necessary that certain exhibits, referred to in the statement of evidence and incorporated therein by reference, should be inspected by the United States Circuit Court of Appeals, it is hereby ordered that true and correct copies of said exhibits be transmitted by the clerk to said court in connection with the statement of evidence and transcript as follows:

1. Respondent's Exhibit A, map showing location of Mahoning property.

186 2. Respondent's exhibit B, map prepared from descriptions of Minnesota authorities.

3. Respondent's Exhibit D, map of tracts 1, 2, 3, and 4.

Said statement of evidence on the petition for review of Edith Andrews Logan is hereby approved and signed and ordered to be made of record in the above-entitled cause this 30th day of September, 1929.

(S.) CHARLES P. SMITH,
Member, United States Board of Tax Appeals.

Now, October 3, 1929, the foregoing statement of evidence certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

187 Before United States Board of Tax Appeals

Filed September 27, 1929

[Title omitted.]

Præcipe for transcript of record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare a transcript of record in this cause and on or before October 15, 1929, transmit the same to the clerk of the United States Circuit Court of Appeals for the Second Circuit and include in said transcript copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the board in the above-entitled cause.
2. Petition for redetermination.
3. Respondent's answer.
4. Findings of fact and opinion of the board, promulgated June 14, 1928.
5. Order of redetermination, entered June 15, 1928.
6. Agreement for review by the United States Circuit Court of Appeals for the Second Circuit, filed December 13, 1928.

188 7. Petition for review by the United States Circuit Court of Appeals for the Second Circuit, filed December 13, 1928.

8. Statement of Evidence.
9. This præcipe for transcript.

In addition to the foregoing documents, please transmit in connection with the transcript of record certified copies of orders enlarging the time for the transmission and delivery of documents in accordance with the rules of the United States Circuit Court of Appeals, which orders are dated, respectively, February 5, 1929, March 20, 1929, June 1, 1929, June 24, 1929, August 1, 1929, August 30, 1929, and September 16, 1929.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

CHARLES D. HAMEL,
JOHN ENRIETTO,
Attorneys for Petitioner.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

Now, October 3, 1929, the foregoing præcipe certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

189 In United States Circuit Court of Appeals, Second Circuit

EDITH ANDREWS LOGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Order substituting party respondent

Nov. 14, 1929

Upon the annexed stipulation, it is ordered that this cause be, and it hereby is, reviewed in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and he hereby is substituted in this cause for the former Commissioner of Internal Revenue David H. Blair.

WM. PARKIN, *Clerk.*

190 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation re substitution

It is hereby stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, as follows:

That since the filing of the petition for review in the above-entitled cause David H. Blair, who was the respondent at that time in the above-entitled cause, and had been Commissioner of Internal Revenue since the appeal was originally filed in the United States Board of Tax Appeals at Washington, D. C., has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted.

That David H. Blair ceased to be Commissioner of Internal Revenue on the 31st day of May, 1929.

That Robert H. Lucas was duly appointed as Commissioner of Internal Revenue to succeed the said David H. Blair and has duly qualified as said Commissioner of Internal Revenue.

That on June 1, 1929, said Robert H. Lucas became Commissioner of Internal Revenue and ever since that time has been, and now is, Commissioner of Internal Revenue.

It is stipulated and agreed between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, that agreeably to this court, and in accordance with the law, this cause may be revived so that this action will be pending against the said Robert H. Lucas, as Commissioner of Internal Revenue, and that said Robert H. Lucas,
191 as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said David H. Blair, formerly Commissioner of Internal Revenue.

That there is substantial need for so continuing and maintaining this cause, because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is further stipulated and agreed by and between the petitioner in the above-entitled cause and Robert H. Lucas, as Commissioner of Internal Revenue, through their respective attorneys, that the service of notice of the motion to revive this action in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and to have his name substituted as respondent in this cause, is hereby waived, and the said Robert H. Lucas, as Commissioner of Internal Revenue, by and through his attorney, consents that an order may be made forthwith by the court reviving this cause in the name of Robert H. Lucas, as Commissioner of Internal Revenue, and substituting him as respondent in this cause for the former Commissioner of Internal Revenue, David H. Blair.

MILLARD F. TOMPKINS,
Attorney for Petitioner.

C. M. CHAREST,
General Counsel Bureau of Internal Revenue,
Attorney for Robert H. Lucas, as
Commissioner of Internal Revenue.

192 In United States Circuit Court of Appeals for the Second Circuit

No. 214. October term, 1929

Argued April 16, 1930. Decided May 19, 1930

EDITH ANDREWS LOGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Before MANTON, SWAN, and AUGUSTUS N. HAND, Circuit Judges

Opinion

Petition to review an order of the United States Board of Tax Appeals. Determination of deficiencies in the income taxes of the taxpayer for the years 1918, 1919, and 1920 were affirmed by the board. The taxpayer appeals. Order reversed.

Millard F. Tompkins, of New York City (John Enrietto, of Washington, D. C., and Herbert C. Smyth, of New York City, of counsel), for petitioner.

G. A. Youngquist, Asst. Atty. Gen., and J. Louis Monarch and John Vaughan Groner, Sp. Assts. to Atty. Gen. (C. M. Charest, Gen. Counsel, Bureau of Internal Revenue, and Allin H. Pierce, Sp. Atty. Bureau of Internal Revenue, both of Washington, D. C., of counsel), for respondent.

MANTON, Circuit Judge:

Prior to March 1, 1913, and until March 11, 1916, the petitioner owned 250 shares, and her mother 1,180 shares of the stock of the Andrews & Hitchcock Iron Company, which had, as its capital structure, 4,000 shares of capital stock issued and outstanding. Andrews & Hitchcock Iron Company held a 12 per cent stock interest in the Mahoning Ore & Steel Company. This latter company controlled, by a lease of 97 years from April, 1895, an iron-ore mine—the Mahoning Mine—located on the Mesaba Range in Minnesota. It was an operating company, and mined the ore which it distributed only to its stockholders, who were steel manufacturers. The property consisted of 1,000 acres of mineral land, and it was estimated that it contained on October 11, 1916, 82,858,535 tons of ore.

On March 11, 1916, the Youngstown Sheet & Tube Company purchased all the outstanding capital stock of the Andrews & Hitchcock Company, thus acquiring the 12 per cent stock interest of the ore mined by the Mahoning Company. In the purchase of this stock it was paid $2,200,000 in cash, and in addition it obtained a contract by which all the former stockholders were paid 60 cents per

ton for each and every ton of iron ore which it might thereafter become entitled to receive from the Mahoning Company under the contract between it and the Mahoning Company. Payments were made annually, and all the transferred stock in the Mahoning Company was deposited as collateral security. Petitioner thus acquired a 250/4000 interest in this contract for annual payments, and when her mother died she acquired, by bequest from her estate, an additional 550/4000 interest in the contract.

Payments were made to the petitioner on account of this contract by reason of her interest therein, and respondent has held this was part capital return and part income as to the sums received in the years in question, 1918, 1919, and 1920. This resulted in the imposition of the tax which is here in dispute. In arriving at this result the respondent determined that the total consideration received by the stockholders from the sale of their stock to the Youngstown Sheet & Tube Company on March 11, 1922, was $2,200,000
193 in cash and $1,942,111.46, the fair market value of the contract providing for payments as stated. And in determining such fair market value he estimated the total ore reserves in the Mahoning mine to be 82,858,535 tons, the average annual production to be 1,841,300 tons, and the life of the mine to be 45 years, and the total future receipts from the contract to be $5,965,814.52. This result was reached by computing the present fair value, using the Haskold formula.

The respondent determined that the total of this consideration was more than the cost of the stock sold but less than its March 1, 1913, value, and he decided that no taxable income had been derived from the sale when made. However, with respect to annual payments from the contract he determined that each payment should be regarded as part income and part capital return. He found the total amount of capital to be recovered was the fair market value of the contract at the time of its acquisition, and he divided each annual payment as between capital and income in the same proportions as the total capital to be recovered bore to the total anticipated receipts included in the gross income of each former stockholder the entire amount received by him during each year, and he allowed as a deduction therefrom the sum which he determined to be a capital return. As to this petitioner's interest, which she acquired from her mother's estate, he determined that the total amount of capital to be allowed was the fair market value of the interest at the time of the decedent's death and permitted capital to be recovered through apportionment of the annual payments as prescribed. He found the return each year to be 32½ per cent capital return and 67½ per cent income.

The revenue act of 1918, c. 18 (40 Stat. 1057), provides, in section 210, the normal tax upon the net income of every individual in the taxable year; section 211 in addition to the normal income, a surtax; section 212 defines net income as the gross income less deduc-

tions defined in sections 213, 214; section 213 (a) considers gross income and includes "gains, profits, and income derived from * * * dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." And section 214 (a) considers allowable deductions and provides:

"(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. * * *

"(10) In the case of mines, oil and gas wells, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted. * * *"

Section 202 (a) provides:

"That for the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal, or mixed, the basis shall be—(1) In the case of property acquired before March 1, 1913, the fair market price or value of such property as of that date; and (2) In the case of property acquired on or after that date, the cost thereof; * * * (b) When property is exchanged for other property, the property received in exchange shall for the purpose of determining gain or loss be treated as the equivalent of cash to the amount of its fair market value, if any. * * *"

At the time Regulation 45, relative to the revenue act of 1918, was effective, and it provided that taxpayers be allowed a deduction in computing net income in cases of natural deposits, a reasonable allowance for depletion of mineral and other depreciations of improvements; that the fair market value of a property was that amount which indues a willing seller to sell and a willing buyer to purchase. Where there has been no sale and the fair market value at the basic date is to be used, such value will be determined by the method which the prospective buyer or seller in the industry would use in arriving at the sale value of the property at the basic date. And article 206 of the regulation provides the method of determining the fair market value of mineral property. Article 210 provides the computation of deduction for depletion of mineral deposits, and by it (a) depletion attaches to the annual production "according to the peculiar conditions of each case. * * *" (b) When the value of the property at the basic date has been determined, depletion for the taxable year shall be determined by dividing the value remaining for depletion by the number of units of mineral to which this value is applicable, and by multi-
194 plying the unit value for depletion, so determined, by the number of units sold within the taxable year. In the selection of a unit for depletion, preference shall be given to the principal or customary unit or units paid for in the product sold.

The valuation placed on the contract for the stockholders' benefit, giving them 60 cents a ton in this case, together with cash paid in the sale, showed no gain over March 1, 1913, valuation, and there was no income tax payable in 1916. However, on the theory that there was a gain involved in the future obligations during the period of 45 years, the tax was imposed by determining, in the manner referred to, that each annual payment was part capital and part income. Income is declared and taxes imposed where cash is paid in a sale or where the thing received is capable of easy valuation in cash. (Lynch v. Turrish (1918), 247 U. S. 221, 38 S. Ct. 537, 62 L. Ed. 1087; Safe Deposit & Trust Co. v. Miles (D. C. 1921), 273 F. 822.) Where the consideration received is found to be the equivalent of cash, it may be valued, and if a profit is realized it will be taxed. (Marr v. United States (1925), 268 U. S. 536, 45 S. Ct. 575, 69 L. Ed. 1079.) Before income can be derived there must be not only some value to the consideration, but it must have an established or fair market value; it must be the equivalent of cash. (Bedell v. Commissioner (C. C. A. 2, 1929), 30 F. (2d) 622; section 202 (b), revenue act of 1918 (40 Stat. 1060).)

There were many uncertainties involved in the future receipt of 60 cents a ton by this petitioner. She, a minority stockholder, was not in control. The right to continue to receive ore was dependent on the continuance in force of the contract of December 16, 1914, between the stockholders of the Mahoning Company. That contract might be abrogated or changed. No maximum or minimum payment is provided for by the contract. The tonnage mined each year was subject to the discretion of the board of directors of the Mahoning Company. The ore mined each year in the future might not come up to the production estimated as necessary to exhaust the mine in 45 years. In enforcing this taxing statute a plain, obvious, and rational meaning is to be preferred. (Lynch v. Alworth-Stephens Co. (1925), 267 U. S. 364, 45 S. Ct. 274, 69 L. Ed. 660.) There was ample testimony satisfactorily establishing that there was no market for the sale of the obligation to pay the 60 cents per ton for 45 years, and it had no cash equivalent. Congress, by the phrase "fair market value" meant that not only must the market price be ascertained by sales, but sales so made and the circumstances under which they were made were to be considered to determine whether such sales serve to evidence not alone a market sale but the fair price which Congress said should be the satisfactory start or base from which subsequent gain derived should be determined. (Walter v. Duffy (C. C. A. 3, 1923), 287 F. 41.) It was the intention of Congress to provide a method of determining gain or loss when property is exchanged for other property, and under the statute there is no taxable gain and no deductible loss unless the property received has a value realizable in money's worth. (Tsivoglou v. United States (D. C. 1928), 27 F. (2d) 564; Heiner v. Crosby (C. C. A. 3d, 1928), 24 F. (2d) 191.) And where the right to receive

moneys is contingent as provided by a contract until the property right secured by the contract has been relieved of its element of risk and turned into cash, the income-taxing act does not reach it, and the contingent right is not income. (Woods v. Lewellyn (C. C. A. 3d, 1918), 252 F. 106.) Cases like Kosmerl v. Commissioner (C. C. A. 7th, 1928), 25 F. (2d) 87; Ruth Iron Co. v. Commissioner (C. C. A. 8th, 1928), 26 F. (2d) 30; and Eldredge v. United States, 31 F. (2d) 924 (C. C. A. 6th), involved efforts to determine gain or loss on the sale of property and the determination of its March 1, 1913, valuation. They did not involve a question, as here, of whether a promise to pay in the future a sum of money in consideration of the transfer of stock has a present market value for determination of gain before the promise is fulfilled. The question in those cases was one of ascertaining the value of the rights as of March 1, 1913, to future annual payments, which value, the taxing statute requires, should be returned before any part of the latter conversion into cash could be considered as income. The necessity of this determination arises only after there has been a gain derived, and the March 1, 1913, valuation is necessary to apportion that gain between the gain accrued prior to and that accrued subsequent to March 1, 1913. (Lucas v. Alexander (1929), 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851, 61 A. L. R. 906.) Here we have the question of whether there was any gain.

The estimate of recoverable tonnage of ore is very much in
195 dispute; likewise the annual production and period of years estimated to complete the mining. Indeed, witnesses familar with the mine and its operation and interested therein and qualified to speak gave testimony that the promise to make future payments had no ascertainable market value. As stated by a learned author, in the practical conduct of mines or mining, sinking funds for amortization of capital are never established. The ultimate duration of the life of a mine is uncertain or unknown and forms no basis on which to formulate a definite financial policy. (Hoover's Principles of Mining, p. 44. See also Pacific Gas Co. v. San Francisco (1924), 265 U. S. 403, 44 S. Ct. 537, 68 L. Ed. 1075.) Moreover, the division of percentage as a return of capital and that of income is an estimate based upon assumptions and uncertainties. It is an unsafe guide either to determine exchangeable value or the fair market value. (O'Meara v. Commissioner (C. C. A. 10th, 1929), 34 F. (2d) 390.)

It is necessary that the future payments made to the stockholders of the Andrews & Hitchcock Company amount to $1,942,111.46 before the petitioner will have a full return of her capital. Until the petitioner receives her full share of this capital return—the exchangeable or fair market value in 1916—she will receive no income, but a return of her capital as deferred payments. There will be no gain or loss realized in the 1916 transaction until this sum is returned to her. As to the shares inherited from her mother's estate, the value of the capital return will be the value of such interest at the time of her mother's death.

The respondent's determination deprived the petitioner of the benefit of that part of the March 1, 1913, value which is greater than the consideration received, to the extent to which the March 1, 1913, value exceeded $2,200,000 plus the present value estimate of the promise to pay as $1,942,101.46. When he ascertained the gain from the subsequent conversion or the disposition of the contract right to receive future payments, he did not give credit to the taxpayer for any March 1, 1913, value, but began the base anew on the theory that the contract right to receive payments when reduced to cash is partly a return of contract right and partly income. In Doyle v. Mitchell Bros. Co. (1918) (247 U. S. 179, at page 185, 38 S. Ct. 467, 469, 62 L. Ed. 1054) the court said: "In order to determine whether there has been gain or loss, and the amount of the gain if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." (See also Goodrich v. Edwards (1921), 255 U. S. 527, 41 S. Ct. 390, 65 L. Ed. 758; Mastin v. Commissioner, 28 F. (2d) 748 (C. C. A. 8th); United States v. Guinzburg (C. C. A. 2d, 1921), 278 F. 363.) The commissioner may not create income by spelling out paper profits with all the attending uncertainties which exist here and which might prevent the return of capital. The statute and the regulation referring to depletion of the mines, we think, have no application to this petitioner.

In his calculations the respondent, being guided by the Haskold formula, has in effect determined that the contract of March 11, 1916, by which the stockholders of the Andrews & Hitchcock Company received these benefits, constitutes a right to annual payments fixed by accepting the tonnage thought to be in the mine, the annual mining operations, the length of time necessary for exhaustion, and the price paid for the ore mined, and this amounted to $132,573.60 annually to be paid to the vendors of the stock. If all went well each year, and the mining operation was the same with the same degree of fortune as to the quantity and quality of the ore mined, there would be insured to the stockholders this annual payment. In effect it would be similar to an annuity. Therefore when this taxpayer sold her stock, in addition to receiving cash, she would obtain what substantially amounts to an annuity for a period of 45 years. If this were a purchase of an annuity, the sums received in the years in question could not be taxed as income. (Warner v. Walsh (C. C. A. 2, 1926), 15 F. (2d) 367.) The same principle is applicable. (United States v. Bolster (C. C. A. 1, 1928), 26 F. (2d) 760, 59 A. L. R. 491; Allen v. Brandeis (C. C. A. 8, 1928), 29 F. (2d) 363.)

There is no taxable income received until there has been a return of petitioner's capital, ascertained by finding her proportionate share of the value of her original 250 shares as of March 1, 1913, and as to those shares inherited from her mother's estate, the value of such interest at the time of her mother's death.

Order reversed.

196 In United States Circuit Court of Appeals, Second Circuit

EDITH ANDREWS LOGAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed May 26, 1930

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said board in accordance with this decree.

WM. PARKIN, *Clerk.*

197 [File indorsement omitted.]

198 [Clerk's certificate to foregoing transcript omitted in printing.]

199 In Supreme Court of the United States

Order extending time within which to apply for writs of certiorari.

Filed August 27, 1930

On consideration of the motion of counsel for petitioner in the above-entitled cases, and good cause therefor having been shown, it is now here ordered that the time within which petition for writs of certiorari may be filed herein be, and the same is hereby, extended for a period of sixty days from this date.

Dated this 22d day of August, 1930.

WILLIS VAN DEVANTER,
Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

U. S. GOVERNMENT PRINTING OFFICE: 1930

Supreme Court of the United States

Order allowing certiorari

Filed December 1, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.